THE

CEYLON LAW REPORTS

BEING

REPORTS OF CASES DECIDED

BY THE

SUPREME COURT OF CEYLON.

Edited by

THOMAS E. DE SAMPAYO, *Advocate,*

Barrister-at-Law, Middle Temple.

AND

JAMES VAN LANGENBERG, *Advocate,*

Barrister-at-Law, Inner Temple.

VOLUME I.

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DIGEST OF CASES.

VOLUME I.

DIGEST.

PAGE.

Account, action for.

See PARTNERSHIP, 1.
PARTNERSHIP, 2.

Account, matters of

See ARBITRATION.

Act of Insolvency.

See INSOLVENCY, 1.

Action for title to land.

See CIVIL PROCEDURE, 7.

Adding party.

See CIVIL PROCEDURE, 2.

Administration.

See CIVIL PROCEDURE, 11.

Administrator.

Action against administrator—Plea of plene administravit—Pleading—Burden of proof—Evidence—Procedure.

In an action against an administrator, who pleads *plene administravit*, the plaintiff may either confess the plea and take judgment of assets *quando acciderint*, or he may take issue on the plea, in which case the burden of proving assets is on him.

D. C., Colombo, No. 3,245, *Don Nicholas* v. *Mack* 81

Annual value.

See ASSESSMENT FOR RATES.

Appeal.

Appeal—Transmission of petition by post—Calculation of time—Holidays—Ordinance No. 3 of 1890, secs. 37 & 38—Holidays Ordinance, 1886.

Sec. 37 of the Stamp Ordinance, 1890, provides for application, by any person desirous of removing doubts as to the liability of any instrument to stamp duty or as to the amount of stamp duty, to the Commissioner of Stamps to declare his opinion thereon.

Sec. 38 provides that the person making the application may appeal against the determination of the Commissioner to the Supreme Court within ten days after the same shall have been made known to him.

The Commissioner of Stamps having, upon application to him, made a certain decision, the applicant within the proper time transmitted by post a petition of appeal to the Supreme Court; but certain public holidays having intervened, the petition did not reach the Registry of the Supreme Court until after the requisite ten days had expired.

Held, that, under the above sec. 38 the appeal must actually be lodged within ten days in the Registry of the Supreme Court, and that the intervention of the public holidays did not avail to extend the time, and that therefore the appeal was out of time and could not be entertained.

In the matter of the Stamp Ordinance No. 3 of 1890, and the application of *D. L. Wickramanaike* of Galle, Notary Public, under sec. 37 thereof 84

See ARBITRATION.
CRIMINAL PROCEDURE, 1.
CRIMINAL PROCEDURE, 5.
CRIMINAL PROCEDURE, 6.
CRIMINAL PROCEDURE, 9.
CIVIL PROCEDURE, 1.
REGISTRATION OF TITLE TO LAND.

Arbitration.

Arbitration—Compulsory reference—Matters of account—Action against partners—Issue of partnership—Ordinance No. 15 of 1866, sec. 55—Appeal—Practice.

Where a case related to matters of account as well as issues which are not matters of account,—

Held, that the Court cannot, under sec. 5 of the Arbitration Ordinance, compulsorily refer all the matters in dispute to arbitration, but only the matters of account; and an award made on such reference is on that ground bad.

Held, also, that a party, who has not objected to the order of reference by way of interlocutory appeal, is not precluded from raising the objection upon the motion for judgment in terms of the award.

D. C., Kandy, No. 2,499, *Ramen Chetty* v. *Abdul Raheman* and another 7

Arrack Ordinance.

Toddy—"Licensed retail dealer"—Drawing toddy—Authority to license—"Tavern-keeper"—Ordinance No. 10 of 1844, secs. 26, 39, & 40.

Where the Government Agent, acting under sec. 26 of the Ordinance No. 10 of 1844, licensed K., or on his behalf B., to sell arrack, rum, and toddy by retail at a certain place,—

Held, that B. was a licensed retail dealer within the meaning of the Ordinance No. 10 of 1844, and had authority lawfully to issue a licence to any person to draw toddy under the provisions of the Ordinance.

Held, further, that a "tavern-keeper", *i. e.*, an employe who presides behind the bar of a tavern and dispenses liquor to customers, does not require a licence in order to enable him to sell arrack, rum, and toddy by retail.

P. C., Batticaloa, No. 5,246, *Curray* v. *Thampan* 42

Assent.

See EXECUTOR, 2.

PAGE.

Assessment for rates.

Assessment—Rating—Annual value—Block of house property—Method of assessment—Ordinance No. 7 of 1887, secs. 127 & 133.

The Ordinance No. 7 of 1887 empowers the Municipal Council "to make and assess, with the sanction of the Governor in Executive Council, any separate or consolidated rate or rates on the annual value of all houses and buildings of every description, and all lands and tenements whatsoever, within the Municipality".

Sec. 133 provides for the appointment of valuers to make "an assessment of the annual value of every house, building, land, or tenement whatever liable to be so assessed within the Municipality".

In the case of a block of house property belonging to one owner let as a whole to one person, who sub-lets to actual occupiers;—

Held, that the question whether, in ascertaining the annual value for rating purposes, the block should be assessed as a whole or each building separately, must be decided according to the circumstances of each case.

Accordingly, where the property to be assessed consisted of a long range of 19 small houses fronting a public thoroughfare, having one compound appurtenant to the whole row, with one well and two closets, for the accommodation of all, and where the whole was let as one property to a tenant who sub-let separately to actual occupiers;—

Held, that the building should be regarded as separate tenements for purposes of rating, and that the annual value for rating is, for each tenement, the rent for which it can reasonably be expected to be let in an average year by the middleman to the occupier, and the annual value of the whole block is the aggregate of such rents.

But *held* that, in making the computation for the whole block, regard may be had to the circumstance that in the case of small holdings there are periods of non-tenancy occasionally, and that rents are not always to be obtained.

D. C., Colombo, No. 1,328, *Mourier* v. *The Municipal Council, Colombo* 92

Assignee, action by

See INSOLVENCY, 3.
MORTGAGE, 7.

Autre fois acquit.

See CRIMINAL LAW, 2

Breach of Promise of Marriage.

Jurisdiction—Breach of promise of marriage—Action on marriage agreement—Cause of action—Pleading.

By a written agreement executed by the plaintiffs, father and daughter, at Chilaw, and by the defendant at Colombo, it was agreed, among other things, that the defendant should marry the 2nd plaintiff at Chilaw within a certain time.

In an action brought in the District Court of Chilaw it was alleged as a breach that within the time specified the defendant was married to a third person at Colombo.

PAGE.

Held, that the District Court of Chilaw had no jurisdiction, but that, the cause of action being alleged to be the marriage of the defendant to a third person at Colombo, the action should have been brought in the District Court of Colombo.

D. C., Chilaw, No. 77, *Paulickpulle* v. *Casie Chetty* 102

Buddhist Temporalities Ordinance.

Buddhist Temporalities—Ordinance No. 3 of 1889—Temple property—Tenancy created by priestly incumbent—Action for rent by lay trustee—Cause of action—Pleading.

The Buddhist Temporalities Ordinance No. 3 of 1889, sec. 17, provides for the election and appointment for every temple a trustee, in whom, by sec. 20, all property belonging to the temple are vested.

Sec. 19 provides: "All contracts made before the date of the coming into operation of this Ordinance in favour of any temple or of any person on its behalf, and all rights of action arising out of such contracts, may be enforced by the trustee under this Ordinance as far as circumstances will admit, as though such contract had been entered into with him; and all persons who at the said date owe any money to any temple or to any person on its behalf shall pay the same to such trustee, who is hereby empowered to recover the same by action if necessary."

Where a person was in occupation of a tenement belonging to a temple under a tenancy created by the priestly incumbent of the temple subsequently to the coming into operation of the Ordinance;—

Held (*dissentiente* BURNSIDE, C. J.), that the lay trustee of the temple could properly sue the occupant for rent, although the contract of tenancy was not entered into directly with him.

C. R., Gampola, *Mudalihamy* v. *Karupanan* 88

Cause of action.

See BREACH OF PROMISE OF MARRIAGE.
BUDDHIST TEMPORALITIES ORDINANCE.
IMPLIED PROMISE.

Charge.

See CRIMINAL PROCEDURE, 2.
CRIMINAL PROCEDURE, 6.
CRIMINAL PROCEDURE, 7.
MAINTENANCE.
TRESPASS.

Cheating.

See CRIMINAL LAW, 2.

Civil Procedure.

1.—*Insolvency—Appeal—Security for costs—Civil Procedure Code, sec. 756.*

The provisions of sec. 756 of the Civil Procedure Code as to security for costs of appeal apply to insolvency proceedings, and consequently no appeal can be entertained from an order of the District Court in insolvency proceedings without such security being given.

D. C., Colombo (Insolvency) No. 1,697, in the matter of the Insolvency of *Mirrinnege Philippo Appuhamy* 29

PAGE.

2.—*Procedure—Action for land—Death of one plaintiff—Surviving plaintiffs sole heirs of deceased plaintiff—Continuation of suit—Administration—Civil Procedure Code, sec.* 547 *and secs.* 392 *&* 394.

In an action for land by several plaintiffs, where the 1st plaintiff died intestate *pendente lite* and the surviving plaintiffs, who were sole heirs of the deceased plaintiff, became between them the owners of the entirety of the land which was the subject matter of the action;—

Held, that the action did not necessarily abate by the death of the 1st plaintiff, nor was it necessary to have an administrator appointed to the estate of the deceased plaintiff and join him as party plaintiff, but that the surviving plaintiffs could continue the suit, not as suing on behalf of the deceased plaintiff or his estate, but on their own account for recovering property which was entirely their own.

D. C., Negombo, No. 15,395, *Fernando* and others v. *Perera* and others 38

3.—*Testamentary Procedure—"Final account"—Distribution of the estate—Petition by legatee for payment of distributive share—Administration suit—Practice—Jurisdiction—Civil Procedure Code, sec.* 720.

In 1882 the executor filed an account which purported to be a final account but which showed that there were still assets in the executor's hands. In a certain proceeding the District Judge in March, 1889, minuted an order that the account filed was thereby passed and the estate closed. In September, 1890, a legatee petitioned under sec. 720 of the Civil Procedure Code praying for an account and payment of the distributive share due to him.

Held, that notwithstanding what purported to be a final account, and the minute of the District Judge of March, 1889, the estate not being wholly distributed the testamentary proceedings were still open, and would properly be continued under the Civil Procedure Code.

Held, that the Court had jurisdiction to entertain the application under sec. 720 of the Code for payment of the distributive share due to the petitioner, and that it was not necessary to institute a separate administration suit for that purpose.

D. C., Matara (Testamentary) No. 768, in the matter of the Last Will and Testament of *Appuhennedigey Baban* 41

4—*Practice—Adding parties—Civil Procedure Code, secs.* 18, 604, *&* 648.

The procedure under sec. 18 of the Civil Procedure Code, for adding a party, should be that followed in England in applications under Order xvi. of the Orders under the Judicature Acts, viz., a party seeking to bring in a third person should obtain *ex parte* an order giving leave to serve a notice on the person whom he desires to bring in, and the question whether such person ought to be joined should be considered and dealt within his presence and in that of the parties already on the record.

D. C., Kalutara, No. 67, *Loos* and another v. *Scharenguivel* 47

PAGE.

5.—*Procedure—Decree nisi—Form of notice—Copy decree—Civil Procedure Code, sec.* 85—*Stamp Ordinance No.* 3 *of* 1890, *Schedule B, Part II.*

In the case of a decree nisi, it is not sufficient, under sec. 85 of the Civil Procedure Code, to give to the defendant a notice embodying the purport of the decree, but the defendant is entitled to receive an authenticated copy of the decree itself.

Such copy decree, before it can be issued, must bear the proper stamp duty as specified in the schedule to the Stamp Ordinance of 1890.

D. C., Kurunagala, No. $\frac{22}{\text{M. }13}$ *Mohottihamy* v. *Lekam Mahatmeya* 62

6.—*Civil Procedure—Action to recover debt due by an intestate—Administration—Civil Procedure Code, secs.* 547 *&* 642—*Interpretation.*

Sec. 547 of the Civil Procedure Code, disallowing actions for the recovery of any property belonging to the estate of a deceased person exceeding in value Rs. 1,000, unless probate or administration had been taken out, refers only to actions on behalf of the estate —actions brought to recover for the estate and those entitled to it anything claimed as belonging to or due to the deceased person, and is inapplicable to actions brought by a creditor to recover a debt due from the deceased person.

D. C., Badulla, No. 115, *Savalingam Kangany* v. *Kumarihamy* 74

7.—*Civil Procedure- Pleading—Averments in pleadings—Action of title to land—Necessary averments in plaint—Civil Procedure Code, sec.* 40—*List of documents annexed to plaint—Admissibility of—Evidence.*

Under sec. 40 of the Civil Procedure Code, in an action for title to land, it is not enough merely to aver ownership, but the pleadings must particularly disclose the title by which such ownership is claimed.

Where a plaintiff in an ejectment suit did not set forth in the plaint the facts relied on as establishing his title or refer to any documents for that purpose, and where he subsequently filed a list of documents relating to his title ;—

Held, that the documents were inadmissible in evidence in the absence from the plaint of allegations as to title, to which they were applicable.

D. C., Batticaloa, No. 108, *Kanapadian* v. *Pietersz* 75

8.—*Civil Procedure—Prescription of action—Objection ore tenus on ground of prescription—Right of the Court to raise such objection mero motu—Pleading—Civil Procedure Code, secs.* 44 *&* 64, *proviso* 2, *para* (*i*)—*Claim in execution—Effect of non-claim—Civil Procedure Code, sec.* 247.

Prescription may be pleaded to an action *ore tenus* at the trial, subject to the question of costs.

After the enactment of the Civil Procedure Code, it is competent for the Court, when the existence of the statutory bar is made apparent at the hearing of an action, to recognise the bar *mero motu*, and refuse to proceed with the action.

PAGE.

In the case of a claim to property seized in execution,—

Held, that the order of the Court on the claim binds only the parties to the claim proceedings; but persons who prefer no claim in execution are at liberty to resort to the regular process of an action at law in respect of any title which they may have to the property seized in execution, irrespective of the provisions of sec. 247 of the Civil Procedure Code.

Held, that when one person for himself, and "on behalf of" others, claims property seized in execution, the latter are not parties to the claim proceedings, and are not bound by any order made therein.

D. C., Jaffna, No. 22,152, *Arunasalam* v. *Ramanathan* 77

9.—*Civil Procedure—Splitting of causes of action —Seizure of property under writ—Claim in execution—Civil Procedure Code, sec.* 34.

Sec. 34 of the Civil Procedure Code enacts: "every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action * * * If a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. * *"

Under writ of execution issued by defendant against a third party, the Fiscal seized certain moveable property, part of which was claimed by plaintiff and another jointly, and part by plaintiff alone. A claim having been made in due course, the District Court rejected the same. Thereupon plaintiff and his co-owner brought one action in respect of the property jointly claimed by them, and subsequently the plaintiff alone brought the present action in respect of the property claimed by himself.

Held, that the present action was rightly brought, and the claim was properly not included in the previous action, and that therefore there was no splitting of the cause of action, so as to bring the case under the operation of sec. 34 of the Civil Procedure Code.

D. C., Kalutara, No. 74, *Fernando* v. *Veerawagu Pulle* 82

10.—*Procedure—Action to realize a mortgage—Practice of making a co-mortgagee defendant on his refusal to join in the action as plaintiff—Civil Procedure Code, sec.* 17—*Pleading.*

In an action to realize a mortgage in favour of two persons, where one mortgagee refuses to join the other as plaintiff in bringing the action,—

Held, that, independently of the provisions of sec. 17 of the Civil Procedure Code, one mortgagee may sue alone, making the other a party defendant.

Semble, in such a case the plaintiff is not bound to restrict himself to the recovery of only half the debt, but might sue for the whole debt, leaving it to the mortgagor to protect himself in that respect.

Observations as to the necessity of meeting by way of replication new matter pleaded in the answer.

D. C., Galle, No. 253, *Gunewardane* v. *Jayasundera* 85

PAGE.

11.—*Administration—Creditor's application—Secretary of the Ceylon Savings Bank—Verification of debt—Affidavit to lend citation—Procedure—Civil Procedure Code, secs.* 523, 530, *&* 544.

The Secretary of the Ceylon Savings Bank applied for and obtained letters of administration to the estate of a person who died in 1877, averring in his petition that the deceased was indebted to the Bank in a certain sum of money on bonds dated 1853, 1859, and 1872. But the affidavit to lead citation neither verified the debt, nor stated circumstances showing that the debt was not barred by prescription.

Held, that the grant of letters of administration was irregular.

By BURNSIDE, C. J., on the ground that the testamentary procedure under the Code did not apply to the estates of persons who died previous to its coming into operation.

By CLARENCE, J., on the grounds (1) that the creditor being the Bank and not the Secretary of the Bank, the provisions respecting a creditor's applications for letters did not warrant their issue to the Secretary, and (2) that in the absence of statements in the affidavit to lead citation setting forth the particulars of the debt, and the circumstances showing it not to be statute barred, the Court had not before it the facts which would justify the claim for administration.

D. C., Colombo, Testamentary, No. 63, In the matter of the goods and chattels of *Meera Lebbe Udoma Lebbe*, deceased.
William Joseph Gorman, Secretary of the Ceylon Savings Bank, Petitioner ..
Samse Lebbe Ismail Lebbe Maricar and others, Respondents 99

Claim in Execution.

See CIVIL PROCEDURE, 8.
CIVIL PROCEDURE, 9.

Compensation.

See CRIMINAL PROCEDURE, 3.

Compulsory Reference.

See ARBITRATION.

Consideration.

See PROMISSORY NOTE, 2.
REGISTRATION.

Costs.

See PRACTICE, 2.
PRACTICE, 6.
JOINT STOCK COMPANY.
PARTITION, 2.
CIVIL PROCEDURE, 1.

Criminal Law.

1.—*Mischief—"Maiming" cattle—Ceylon Penal Code, sec.* 412—*Construction.*

Sec. 412 of the Penal Code enacts: "whoever commits mischief by killing, poisoning, maiming, or rendering useless any elephant, camel, horse, ass, mule, buffalo, bull, cow or ox, &c., shall be punished with imprisonment," &c.

In a charge under the above sec. of committing mischief by maiming certain cattle, where

PAGE.

the proof was that the animals had been cut by the defendant but had recovered.

Held, that the word "maiming" in the above section meant permanently injuring, and that the facts did not sustain the charge made.

D. C., Tangalla, No. 2,612, *Andris* v. *Semela* 48

2.—*Cheating—Charge—Obtaining money by a promise—Intention not to carry out promise —Ceylon Penal Code, sec.* 398.

A charge of cheating should set out the means by which the cheat has been accomplished.

Under the penal Code, in a charge of obtaining money by false pretence, the false pretence need not necessarily be as to existing facts, but may include a promise which the party at the time of making it intended to break.

P. C., Badulla, No. 1,921, *Carey* v. *De Silva* 49

3.—*Lottery—"Keeping" a place for the purpose of drawing a lottery—Evidence—Ceylon Penal Code, sec.* 288.

The Ceylon Penal Code, sec. 288, enacts: "Whoever keeps any office or place for the purpose of drawing any lottery, shall be punished with imprisonment," &c.

Held, that the above section contemplates only lotteries held in a place avowedly kept for the purpose of drawing lotteries, and that permitting a lottery to be held in a place on one occasion is not "keeping" that place for the purpose of drawing any lottery within the meaning of the above section.

P. C., Colombo, No. 2,512, *Perera* v. *Silva* and others.. 57

4.—*Grievous hurt—Permanent impairing of the eye—Ceylon Penal Code, sec.* 311—*Evidence.*

The eye is not a "member or joint" within the meaning of sub-sec. 5 of sec. 311 of the Penal Code so as to make permanent impairing of the eye grievous hurt.

Nor does the permanent impairing of the eye without actual privation of sight constitute grievous hurt within the meaning of the said section.

D. C., Criminal. Galle, No. 11,861, *Dissanayake* v. *Bastian* and others 67

5.—*Plaint—Charge—Possession of false weights —"Fraudulently"—Ceylon Penal Code, sec.* 259—*Ordinance No.* 11 *of* 1887, *sec.* 1—*Evidence.*

Since the Ordinance 11 of 1887, in a charge of possession of false weights under sec. 259 of the Penal Code, it must be alleged in the plaint and proved that the defendant possessed the weights intending that the same may be fraudulently used.

In a case where the Magistrate has not framed a charge but convicts the defendant on the plaint of the complaining party, the Supreme Court would not amend a defective plaint by inserting necessary words so as to make it disclose an offence.

P. C., Ratnapura, No. 6,671, *Modder* v. *Senatamby* 68

PAGE.

6.—*Resistance to a public officer—Obstruction—Ceylon Penal Code, sec.* 183—*Execution of writ against property—Claim and obstruction of seizure—Right of private defence—Ceylon Penal Code, secs.* 89, 90, *&* 92.

Sec. 89 of the Ceylon Penal Code enacts: "Nothing is an offence which is done in the exercise of the right of private defence."

Sec. 92 sub-sec. 2 provides: "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done, by the direction of a public servant in good faith under colour of his office, though that direction may not be strictly justifiable by law."

The complainant, a Fiscal's officer, in executing a writ against property, attempted to seize as the property of the execution debtor certain cloths lying in the defendant's shop and claimed by defendant as his. The defendant resisted the seizure, taking the goods out of the hand of the officer and replacing them in an almirah from which the officer had taken them.

In a charge against the defendant, under sec. 182 of the Ceylon Penal Code, of obstructing a public servant in the discharge of his public functions;—

Held, that the property sought to be seized not being proved to be other than defendant's, the obstruction, not amounting to an assault or personal injury, was a lawful act in the exercise of the right of private defence of property, notwithstanding the provision of sec. 92, sub-sec. 2 of the Penal Code, and did not constitute the offence contemplated by sec. 183 of the Code.

P. C., Jaffna, No. 8,529, *Canthapillai Odaiar* v. *Murugesu* 90

7.—*Criminal trespass—Remaining on board a steamer when ordered to leave—Defective charge—Ceylon Penal Code, sec.* 427.

A charge against a defendant that he did at the Colombo harbour on board a steamer "commit criminal trespass by unlawfully remaining there when ordered to leave the ship by the chief officer of the said ship";—

Held, to disclose no offence.

P. C., Colombo (Additional) No. $\frac{307}{1,167}$, *Smith* v. *Ahamado* 17

USUFRUCTUARY INTEREST IN PADDY LAND.

See IMPLIED PROMISE.

Criminal Procedure.

1.—*Appeal—Charge on two counts—Sentence of one month's imprisonment on each count—Criminal Procedure Code, sec.* 405.

Where a Police Court sentences a defendant to imprisonment for one month on each of two counts of a charge framed against him, an appeal lies at the instance of the defendant under sec. 405 of the Criminal Procedure Code.

P. C., Panadura, No. 2,918, *Fernando* v. *Gimanis* and others 10

PAGE.

2.—*Police Court—Discharge of the defendant—Fresh inquiry at the direction of the Attorney-General—Criminal Procedure Code, secs.* 152 *&* 254—*Plea of autre fois acquit—Jurisdiction—Practice.*

The Criminal Procedure Code, ch. xvi., sec. 152, *inter alia*, enacts that a Police Court shall proceed to try an offender or to inquire into the matter of an alleged offence and commit for trial or otherwise dispose of any accused person "whenever it appears to the Attorney-General that an offence has been committed, and he shall by his warrant under his hand require the Magistrate to inquire into the same"

Sec 254 enacts: "Whenever a Police Court shall have discharged an accused person under the provisions of ch. xvi, and the Attorney-General shall be of opinion that such accused person should not have been discharged, the Attorney-General may file an information against such persons either in the Supreme or a District Court," &c.

In a previous criminal proceeding in the Additional Police Court of Colombo upon a complaint against the defendants for an offence not summarily triable, the Police Magistrate after investigation disbelieved the evidence, and discharged the defendants. Subsequently the Attorney-General, acting under ch. xvi., sec. 152, of the Criminal Procedure Code, required the Police Magistrate of Colombo to inquire into the same alleged offence.

Held, that sec. 254 of the Criminal Procedure Code was not imperative, but that the Attorney-General may proceed under that section or under sec. 152, and that the Attorney-General having issued the warrant under sec. 152, the Police Magistrate had jurisdiction to inquire into the same offence, notwithstanding the previous discharge of the defendants.

P. C., Colombo, No. 12,685, *Savariel* v. *Bastian Appu* and others 19

3.—*Criminal procedure—Compensation—Non-summary case—Jurisdiction—Criminal Procedure Code, sec.* 236.

In the case of a charge for house-breaking and theft under sec. 434 of the Penal Code, the complainant mentioned in his complaint an assault by the defendant as an incident of the occurrence. The Police Magistrate on dismissing the case ordered complainant to pay compensation to the defendants in respect of the complaint as to the assault.

Held, following *Jayatilleka* v. *Davit Appu*, 8 S. C. C. 196, that a Police Magistrate cannot award compensation to the defendant in a case not summarily triable.

Held, also, that in a non-summary case the Police Magistrate cannot separate from the general complaint an incident of the alleged offence as a charge summarily triable and then make it the subject of an order for compensation.

P. C., Kalutara, No. 9,932, *Hendrick Appuhamy* v. *James* and others 21

4.—*Police Court—Jurisdiction—Certificate of the Attorney-General—Summary trial—Consent of the defendant—Ordinance No 26 of* 1885, *sec.* 39—*Criminal Procedure Code, secs.* 9 *&* 226.

Since the Criminal Codes, where an enactment creating a statutory offence has fixed the maximum punishment beyond the Police Court jurisdiction, and does not expressly provide for the trial of such offence by the Police Court, a Police Court cannot summarily try such offence, except by leave of the Attorney-General under sec. 9 of the Criminal Procedure Code, or by consent of the defendant under sec. 226 of the Criminal Procedure Code.

In a charge under sec. 32 of Ordinance No. 26 of 1885 against a railway official for being in a state of intoxication whilst employed upon the railway, the punishment provided for such offence being imprisonment not exceeding one year or fine not exceeding Rs. 200, or both ;—

Held, that the Police Court could not try the offence summarily, except by leave of the Law Officers of the Crown, as provided in sec. 39 of that Ordinance, or in sec. 9 of the Criminal Procedure Code, or by consent of the defendant under sec. 226 of the Criminal Procedure Code.

P. C., Colombo, No. 14,378, *Ireson* v. *Whittle* 34

5.—*Criminal procedure—Plea of guilty—Jurisdiction—Appeal—Sentence—Criminal Procedure Code, sec.* 403.

A plea of guilty admits the jurisdiction of the Court, and therefore in an appeal from a conviction upon such a plea no objection to jurisdiction can be entertained

Notwithstanding the provisions of sec. 403 of the Criminal Procedure Code, an accused person who has pleaded guilty can raise by appeal the question whether any sentence can legally pass under the charge to which he pleaded guilty.

Where the defendant pleaded guilty to an information charging him under sec. 219 of the Penal Code with having escaped from custody in which he was detained "for an offence with which he was charged" ;—

Held, that the conviction varied from the charge to which the defendant pleaded, and was therefore bad.

P. C., Galle, No. 10,895, *Silva* v. *Romanis* .. 38

6.—*Criminal procedure—Charge of retaining stolen property—Acquittal of defendant—Restoration of stolen property—Jurisdiction—Appeal—Criminal Procedure Code, sec.* 478.

Sec. 478 of the Criminal Procedure Code enacts: "When an inquiry or trial in any criminal court is concluded, the Court may make such order as it thinks fit for the disposal of any document or other property produced before it, regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

When a person was charged with dishonestly retaining stolen property, knowing it to have been stolen, under sec. 394 of the Penal Code, and the Police Magistrate found as a fact that the property (which was produced before the Court) was the property of the complainant and had been stolen, but acquitted the defendant of the charge against him;—

Held, that in view of the finding of the Magistrate that the property, the subject matter of the prosecution, was the property of the complainant and had been

PAGE.

stolen, the Police Magistrate had power under sec. 478 of the Criminal Procedure Code to direct the restoration of the property to the complainant, notwithstanding the acquittal of the defendant upon the charge made against him.

P. C. Balapitiya, No. 3,391, *Silva* v. *Rajelis* 39

7.—*Criminal procedure—Charge—Complaint or information—Ordinance No.* 22 *of* 1890.

Ordinance No. 22 of 1890 substitutes a new chapter for ch. xix. of the Criminal Procedure Code.

Sec. 226 of the substituted chapter enacts as follows:—

(1) A Police Magistrate may convict an accused of an offence over which a Police Court has summary jurisdiction which, from the facts admitted or proved, he appears to have committed, whatever may be the nature of the complaint or information.

(2) The Police Magistrate, before he so convicts an accused as aforesaid, shall frame a charge in writing, and shall read and explain the same to the accused; and such of the provisions of ch. xviii. as relate to altered charges shall apply to a charge framed under this section.

Held, that since the Ordinance No. 22 of 1890 a formal charge need be framed in a summary case, only where the Police Magistrate convicts the accused person of an offence other than that disclosed in the complaint or information.

P. C., Badulla, No. 6,986, *Ramlan* v. *Carder Meedin* 43

8.—*Jurisdiction—Evidence heard by two Magistrates—That for the prosecution by one, and that for the defence by the other—Decision by the latter—Practice—Criminal Procedure Code, sec.* 19.

In a summary trial, where one Magistrate heard the evidence of the prosecution and another Magistrate, his successor, heard the evidence for the defence and decided the case upon the whole evidence;—

Held, the second Magistrate had jurisdiction under sec. 19 of the Criminal Procedure Code to try and decide the case upon the materials recorded by his predecessor and himself.

P. C., Kegalle, No. 7,538, *Ward* v. *Puncha* .. 65

9.—*Criminal procedure—Revision—Application for revision of an appealable order—Criminal Procedure Code, sec.* 426.

The Supreme Court would not in general interfere by way of revision, under sec. 426 of the Criminal Procedure Code, in cases where an appeal might be taken.

Municipal Court, Galle, No. 1,431, *Bogaars* v. *Karunaratne* 80

Damages.

See MALICIOUS PROSECUTION.

Deed of gift.

See FIDEI COMMISSUM.
REGISTRATION.

Discharge.

See MALICIOUS PROSECUTION.

PAGE.

Ejectment.

1.—*Ejectment—Title to land—Insolvency of owner—Assignee in insolvency—Death of owner—Right of heirs—Ordinance No.* 7 *of* 1853, *sec.* 71.

Under sec. 71 of the Insolvency Ordinance the property of the insolvent vests in the assignee absolutely upon his appointment, and not merely for the purposes of the trust; and in order that the property may so vest, it is not necessary that a formal sequestration of the property should emanate from the Court.

Where the original owner of land was adjudicated insolvent and died after the appointment of an assignee, and his heirs sued in ejectment a third party in possession who put their title in issue;—

Held, that in the absence of a conveyance by the assignee or of prescriptive possession, the assignee was not divested of his title, and the plaintiff's action failed for want of title in them.

D. C., Colombo, No. 1,075, *Jansz* v. *Idroos Lebbe Marikar* 63

2.—*Ejectment—Issue of title—Party in possession—Burden of proof—Evidence.*

In an action in ejectment, where the plaintiff is proved to have been in *bona fide* possession of the land at the time of ouster, the burden lies on the defendant to prove that he is owner of the land; and in the absence of such proof the plaintiff is entitled to judgment without proof of his title.

C. R., Haldummulla, No. 17, *Mudalihamy* v. *Appuhamy* 67

Endorsement.

See PROMISSORY NOTE, 1.

Estoppel.

See PARTITION, 1.

Evidence.

See ADMINISTRATOR.
CIVIL PROCEDURE, 7.
CRIMINAL LAW, 4.
CRIMINAL LAW, 5.
CRIMINAL PROCEDURE, 3.
CRIMINAL PROCEDURE, 4.
CRIMINAL PROCEDURE, 8.
EJECTMENT, 2.
PARTNERSHIP, 1.

Executor.

1.—*Executor—Action against, before probate—Sale of testator's property—Letters of administration testamento annexo—Irregularity—Sale by administrator—Title—Procedure.*

One of several executors of a will proved the will, but did not take out probate. A simple contract creditor of the testator sued the executor, who proved the will, and upon judgment obtained certain immoveable propety belonging to the estate was seized and sold to a purchaser, through whom the defendant claimed. Subsequently no steps beyond proof of the will having been taken by the executor or executors, letters of administration *cum testamento annexo* were granted in the testamentary suit to the Secretary of the District Court, who as administrator

PAGE.

sold the same property, when plaintiff became the purchaser.

In a contest between plaintiff and defendant as to the title to the property ;—

Held (*dissentiente* Clarence, J.) that the judgment obtained against the executor who proved the will, though he had not taken out probate, was good and bound the estate of the testator, and that therefore the defendant who claimed through the purchaser under that judgment had good title to the property as against the plaintiff.

Held, that the executor having proved the will and thereby accepted the trust, the letters of administration *cum testamento annexo*, subsequently granted to the Secretary of the District Court, were irregular and void.

Held, by Burnside, C. J., that even if the letters were good until revoked, they did not have the effect of divesting the executor of the title which had vested in him under the will, and the administrator therefore had no title to convey to the plaintiff.

D. C., Colombo, No. 2,298, *Mohideen Hadjiar* v. *Pitchey* 94

2.—*Executor—Devisee of immoveable property—Title of executor—Right to possession—Assent—Devisee in possession—Right to rents and profits.*

In Ceylon, land passes to the executor as personal property passes to the executor in England, and the assent to a devise of land corresponds to the assent to a bequest of personal property in England.

The title of the devisee of land is subject to the executor's power of assent or otherwise ; and until that assent has been given the executor has a right to the possession of the property, subject to his having to account to the devisee for mesne profits in the event of the devise taking effect.

But where the devisee has been allowed to take, and remain in possession, and has disposed of the produce of the land on contract to a third party, pending the administration of the estate by the executor ;—

Held, that the devisee is entitled to claim the price from the purchaser as against the executor, subject to the executor's power, in the event of resort to the property being necessary for the payments of debts, to call upon the devisee to account for the mesne profits since the testator's death.

D. C., Kandy, No. 3,833, *Mulu Manika* v. *Anderson; James S. Sinclair*, Executor of the Last Will and Testament of John Forbes McLeod, added party 101

False Weights.

See CRIMINAL LAW, 5.

Fidei Commissum.

Fidei commissum—Deed of gift—Interpretation.

The owner of certain land granted it, by way of donation *inter vivos*, to a person, "his heirs, executors, and administrators", subject to the condition "that in the event of the donee happening to die without specially disposing of the aforesaid property by will or otherwise, or after marriage without lawful children or their legal descendants, it is to be clearly understood that no part of the gift hereby granted can be included in the community of goods of his wife, but that the same shall revert to the brothers and sisters of the donee or their lawful descendants *pro rata* according to the law of inheritance".

Held, that the property vested absolutely in the donee, and that the same having been mortgaged by the donee and sold under the mortgagee's writ after the donee's death, the purchaser acquired a good title as against the brothers and sisters of the donee.

D. C., Matara, No. 35,584, *Dissanaike* v. *Dias* 6

Final account.

See CIVIL PROCEDURE, 1.

Fiscal.

1.—*Fiscal—Writ holder in his private capacity—Writ issued to Secretary of Court, under sec.* 26 *of Ordinance No.* 4 *of* 1867—*Duty of such Secretary—Negligence by—Irregularity—Parate execution—Re-issue of writ—Practice.*

The judgment creditor and plaintiff being himself Fiscal, the Secretary of the Court was appointed to execute writ, and the same was issued to him for execution accordingly. Property was seized and sold, but the purchaser made default, but no security was taken from him. The property was then resold and purchased by the plaintiff for an amount less than that of the original sale, and leaving still a balance under the judgment. No parate writ was applied for in time or issued against the first purchaser.

Held, that the plaintiff was entitled to have the writ issued for the recovery of the balance amount due under the judgment.

Held, by Clarence and Dias, JJ., that the duty delegated by the Court to the Secretary included the incidental power of taking security from any purchaser, and that of issuing parate execution.

D. C., Colombo, No. 1,266, *Arunachalam* v. *Pieris* 8

2.—*Fiscal—Action against—Notice—Ordinance No.* 4 *of* 1867, *sec.* 21.

A letter written to the Fiscal giving notice that the party claims from the Fiscal a certain sum of money as damages for alleged negligence, and without intimating that any action will be brought, does not constitute a notice of action within the meaning of sec. 21 of the Fiscal's Ordinance.

D. C., Colombo, No. 2,537, *Casi Lebbe Marikar* v. *Arunachalam* 61

Grain Tax.

See IMPLIED PROMISE.

Grievous hurt.

See CRIMINAL LAW, 4.

Implied promise.

PAGE.

Cause of action—Usufructuary interest in paddy land—Payment of grain tax by the usufructuary on seizure of land—Liability of owners to repay the amount of tax so paid—Implied promise to pay.

The defendants, owners of certain paddy land, to a share of the produce of which the plaintiff was entitled, having made default in payment of the grain tax due to Government, the land was seized by Government, when plaintiff paid the amount of tax due and released the land.

Held, that the law would imply a promise on part of defendants to reimburse plaintiff their proportion of the tax so paid, and that the plaintiff could recover such amount in an action for money paid.

C. R., Batticaloa, No. 129, *Brown* v. *Kantappen* and three others 73

Imprisonment for debt.

See INSOLVENCY, 1.

Insolvency.

1.—*Insolvency—Lying in prison for 21 days—Imprisonment for debt—Committal upon warrant in mesne process—Act of Insolvency—Ordinance No. 7 of 1853, sec. 9.*

K., being a defendant in a certain suit, was arrested under warrant in mesne process, and was on February 4, 1890, committed to prison for default of giving security under Ordinance No. 15 of 1856. On February 28, 1890, K., being still in prison, petitioned for the sequestration of his estate, and prayed that he be adjudicated insolvent.

Held, that this was not a commitment for debt or non-payment of money or a detention for debt within the meaning of sec. 9 of the Insolvency Ordinance, and that consequently K.'s lying in prison for 21 days under the above commitment was not such an act of insolvency as entitles him to be adjudicated insolvent.

D. C., Kandy (Insolvency), No. 1,292, in the matter of the insolvency of *Pilche Mullu Kangany* 20

2.—*Insolvency—Right of insolvent to protection—Last examination—Ordinance No. 7 of 1853, sec. 36.*

After a person is adjudicated insolvent, he is entitled to protection as of right until the time allowed for finishing the examination.

D. C., Galle (Insolvency), No. 212, in the matter of the insolvency of *Punchihewage Don Juanis* 23

3.—*Assignee in insolvency—Action by—Leave of Court—Practice—Ordinance No. 7 of 1853, sec. 82.*

The right of an assignee in insolvency to sue depends on leave of Court being previously obtained for the purpose, and the fact of such leave of Court having been granted must appear in the pleadings.

An action brought by an assignee without such leave of Court must fail, even though the defendant has not taken the objection by way of plea or demurrer.

D. C., Colombo, No. 82,945, *Phebus* v. *Fernando* 26

See CIVIL PROCEDURE.

PAGE.

4.—*Insolvency—Lying in prison for debt—Discharge from custody—Surrender—Ordinance No. 7 of 1853, sec. 36.*

Sec. 36 of Ordinance No. 7 of 1853 enacts, *inter alia* "where any person, who has been adjudged insolvent and surrendered and obtained his protection from arrest, is in prison or in custody for debt at the time of his obtaining such protection, the Court may * * * order his immediate release, either absolutely or upon such conditions as it shall think fit".

The same section enacts, "whenever any insolvent is in prison or in custody * * if he be desirous to surrender" he shall be brought up by warrant directed to the person in whose custody he is confined.

Where a person was adjudged insolvent, he having lain in prison for debt over 21 days, and was yet in custody;—

Held, that he could not be released from custody before he has surrendered within the meaning of the above section of the Insolvency Ordinance.

D. C., Colombo (Insolvency), No. 1,728, in the matter of the insolvency of *Don Solomon Fernando* 35

See CIVIL PROCEDURE, 1.
EJECTMENT, 1.

Intervention.

See PARTITION, 1.

Joint Stock Company.

Joint Stock Company—Official liquidator—Appointment of "law agents" or proctors—Approval of Court—Payment of proctors' costs out of the assets of the Company—Ordinance No. 4 of 1861, sec. 100.

Sec. 100 of the Joint Stock Companies Ordinance (No. 4 of 1861) enacts: "The official liquidators may, with the approval of the Court, appoint such clerks or officers as may be necessary to assist them in the performance of their duties. There shall be paid to such agent, clerks, and officers such remuneration, by way of fees or otherwise, as may be allowed by the Court."

Held, that the above provision applies to the appointment of proctors.

And where the official liquidator had appointed certain proctors, and they had filed their proxy and had acted for the official liquidator in the proceedings but the approval of the Court had not been obtained for their original appointment;—

Held, that the proctors so appointed were not entitled to be paid any costs out of the assets of the Company.

D. C., Colombo (Special), No. 33, in the matter of the *Jaffna and Batticaloa Agricultural and Commercial Company, Limited, in Liquidation* 25

Judgment, assignment of.

See MORTGAGE, 7.

Jurisdiction.

See CIVIL PROCEDURE, 1.
BREACH OF PROMISE OF MARRIAGE.
PROMISSORY NOTE, 1.

PAGE.

MUNICIPAL COUNCIL.
CRIMINAL PROCEDURE, 2.
CRIMINAL PROCEDURE, 3.
CRIMINAL PROCEDURE, 4.
CRIMINAL PROCEDURE, 5.
CRIMINAL PROCEDURE, 6.
CRIMINAL PROCEDURE, 8.
TRANSFER OF CASE.

Land Acquisition.

Land acquisition—House or building—Compensation—Ordinance No. 3 of 1876, secs. 4 & 11—Procedure.

The provisions of the Land Acquisition Ordinance No. 3 of 1876 are applicable for the purpose of acquiring only land, and not a house or building without the ground on which it stands.

In a case where the Government had acquired by private contract the site on which a building stood, and subsequently instituted proceedings in the District Court under the Land Acquisition Ordinance for the purpose of acquiring the building itself;—

Held, that the reference was bad, and the Court had no jurisdiction to entertain it.

D. C., Kalutara (Reference Case), No. 135, *Saunders* v. *Abeyratne* 71

Lease.

Deed of lease—Breach of covenant—Right of re-entry—"Said"—"Herein contained"—Construction—Pleading.

The plaintiffs by an indenture of lease, "in consideration of the rents hereinafter reserved and of the lessee's covenants hereinafter contained", demised certain premises to defendant for a certain term of years. The indenture then stated certain covenants on the part of the lessee for payment of rent and for repairs, and also certain covenants on the part of the lessors for quiet enjoyment on the lessee paying the rent "hereinbefore provided" and performing "the conditions and covenants herein contained". The deed then provided that if the rent were not duly paid "or in case of the breach or non-performance of any of the said covenants and agreements herein on the part of the said lessee contained, then and in any of the said cases "it shall be lawful for the lessors to re-enter and determine the lease. The deed then provided that the insurance on the premises should be paid by the lessors, but that any increased or extra premiums payable for insurance by reason of anything extra hazardous brought into or done in the premises should be paid by the lessee. The deed finally provided for renewal of the lease on certain conditions.

In an action by the lessors against the lessee for re-entry on the ground of non-payment by the lessee of a certain sum paid by the lessors as increased premiums for insurance by reason of an extra-hazardous thing being brought into the premises;

Held (*dissentiente* CLARENCE, J.), that the proviso for re-entry applied only to breaches of covenants that preceded it, and not to the agreement in respect of insurance, which followed, and that therefore the plaintiffs' action for re-entry failed.

Held, further, that at most the plaintiffs' remedy was for recovery of the money paid as extra premium for insurance.

D. C., Colombo, No. 2,160, *Clarke* v. *Hutson* 50

Legium.

See MEDICAL PRACTITIONER.

Maintenance.

Maintenance—Charge of non-maintenance of illegitimate child—Question of paternity—Dismissal of previous charge—Res judicata—Ordinance No. 13 of 1889.

In proceedings under the Maintenance Ordinance No. 19 of 1889, against a putative father for non-maintenance of a child;

Held, that the dismissal of a previous charge, whether for insufficiency of evidence or upon any other defect in the case, is a decision upon the merits, and such decision bars a second application.

Held (*dissentiente* CLARENCE, J.), that the liability created by the said Ordinance, and the proceedings thereunder are in their nature criminal.

P. C., Kandy, No. 10,709, *Rankiri* v. *Kiri Hattena* 86

Malicious prosecution.

Malicious prosecution—Action for damages—"Discharge"—Determination of the prosecution.

The discharge of a defendant in a criminal case by the Magistrate under sec. 168 of the Criminal Procedure Code is a sufficient determination of the prosecution for the maintenance of a civil action for damages for malicious prosecution.

D. C., Kandy, No. 2,171, *Seyadu Ismail* v. *Mohamadoe Assen* 18

Master and Servant.

Master and servant—Rice advances to coolies—Right of employer—Engagement for particular work—Ordinance No. 11 of 1865, sec. 19.

An employer of coolies bound by ordinary contract of monthly service is under no legal obligation to make rice advances, and the coolies are not entitled to leave service merely because such advances are not made.

When coolies are engaged for a particular work, the service within the meaning of the penal clauses of the Labour Ordinance ceases when that work is over or given up; and the employer cannot seek to prevent them from leaving until any money due to him for advances be paid, or to pass them on to some other employer who would pay him their debts.

P. C., Haldummulla, No. 3,335, *Dumphy* v. *O'Brien* 22

2.—*Master and servant—Criminal liability of the master for the servant's acts—mens rea—Breach of sec. 20 of the Ceylon Railways Ordinance* 1885.

A master is not criminally liable for his servant's acts unless he had the *mens rea*, or unless he is made so liable by statute.

P. C., Gampola, No. 9,559, *Herat* v. *Northway* 27

PAGE.

3.—*Master and servant—Action for wages—Right of master to mulct servant in wages for misconduct.*

A master has no right to stop any portion of his servant's wages for misconduct.

C. R., Newara Eliya, No. 32, *Appu Sinno* v. *Scott Coults* 32

Medical Practitioner.

Medical practitioner—Sale of "legium"—Opium—Ordinance No. 4 of 1878, secs. 10 & 13—Interpretation.

Ordinance No. 4 of 1878, sec. 10, makes it penal to possess or sell without a license any opium or bhang which by sec. 4 includes respectively any preparation in which opium or bhang forms a component part.

Sec. 13 provides that nothing in the Ordinance shall be held to prevent any medical practitioner or druggist from selling by retail or possessing opium or bhang *bona fide* for medicinal purposes.

In a charge under sec. 10 against a Moorman practising in native medicine for sale of *legium* ;—

Held, that defendant was a "medical practitioner" within the meaning of sec. 13 of the Ordinance, and was therefore entitled to the exemption created by that section.

P. C., Galle, No. 1,330, *Jansz* v. *Usubu Lebbe* 90

Minor.

See TORT.

Mischief.

See CRIMINAL LAW, 1.

Mortgage, assignment of.

See MORTGAGE, 3.

Mortgage.

1.—*Mortgage of moveables—Sale of mortgaged property by unsecured creditor—Claim to proceeds—Preference—Ordinance No. 8 of 1871—Roman Dutch Law—Mobilia non habent sequelam—Practice.*

A mortgagee of moveables, hypothecated by an instrument in writing without delivery of possession, and subsequently seized and sold under an unsecured creditor's writ, can claim in preference the proceeds sale of the property mortgaged.

The creditor under whose writ the property has been sold is not entitled to preference against the mortgagee even in respect of the costs of the action.

D. C., Colombo, No. 285, *Casy Lebbe Markar* v. *Aydroos Lebbe Markar, ex parte M.M. Abdul Raheman, claimant* .. 1

2.—*Moveables—Mortgage of—Sale to a third party by mortgagor—Seizure by mortgagee—Action by purchaser against mortgagee.*

By an instrument in writing a third party purported to hypothecate to defendant "all the right, title, and interest in respect to all those 25 tons of ebony" which he had acquired a right to cut and remove from a certain forest, and he further covenated as soon as the ebony was cut to carry and deliver it to defendant to be kept by defendant until redeemed by payment of the debt. He subsequently cut and sold and delivered the ebony to plaintiff, and the defendant having in an action against his mortgagor seized on sequestration the ebony in plaintiff's possession, and subsequently sold it under writ, the plaintiff sued defendant for the value of the ebony.

Held, that defendant had at most only a right as against his mortgagor to have the ebony delivered to him when cut, and that he had no right to follow the ebony in plaintiff's possession, and was liable to plaintiff for its value.

D. C., Kurunegala, No. 7,244, *S. E. A. Walleappa Chetty* v. *K. Cader Meera Saibo* .. 4

3.—*Sub-mortgage of mortgage bond—Sale and assignment of bond by Fiscal—Satisfaction of judgment—Ordinance No. 4 of 1867, sec. 44—Practice.*

The plaintiffs sued 1st defendant as principal, and 2nd defendant as surety for the recovery of Rs. 750 due upon a bond, whereby 1st defendant mortgaged as security for the debt a mortgage bond for a similar amount in his favour by A. and M. containing a mortgage of certain lands. Upon judgment obtained, plaintiffs issued writ and sold, *inter alia*, A. and M.'s bond, and became the purchasers thereof for Rs. 100, and obtained an assignment of the bond from the Fiscal. Thereafter plaintiffs received from A. and M. in full satisfaction the sum of Rs. 500, being less than the amount then due on their bond. The judgment in this case having subsequently become dormant, plaintiffs, crediting defendants with the amount of the purchase money of the bond, and certain other levies, took proceedings to revive judgment for the balance still due. The 1st defendant being present and showing no cause, the judgment was revived accordingly, and writ re-issued.

Held, per CLARENCE and DIAS, JJ. (*dissentiente* BURNSIDE, C. J.) that A. and M.'s bond, mortgaged by the 1st defendant, was properly seized and sold in execution, and the plaintiffs were not bound to follow the procedure laid down in sec. 44 of the Fiscals Ordinance for the purpose of realising the money due thereon.

Held, also, that by the sale and assignment of the bond to plaintiffs, all the interest of the 1st defendant therein absolutely vested in plaintiffs and the 1st defendant was neither discharged from his liability under the judgment, by reason of the plaintiffs discharging the original mortgagors upon receiving part of the amount due on their bond, nor entitled to be credited with the sum so received.

D. C., Badulla, No. 26,672, *Muttappa Chetty* and another v. *Kiduru Mohamadoe* and another 12

4.—*Mortgagee in possession—Purchaser at sale under mortgage decree—Right of purchaser from original owner subsequent to mortgage ejectment—Action to redeem.*

T. was mortgagee in possession of certain property belonging to N., who subsequently conveyed the property to plaintiff, subject to T.'s mortgage, which the plaintiff covenanted with N. to pay off. T. sued N. on his mortgage in an action to which plaintiff was no party. He obtained judgment and a mortgagee's decree, and having

PAGE.

issued writ purchased the property himself. T. subsequently sold the property to S., and defendant purchased it under writ against S. and entered into possession.

Held, that the plaintiff could not sue the defendant in the ordinary action of ejectment.

Held, that the effect, if any, of plaintiff not being a party to the suit between T. and N. on the mortgage was to replace T. or any person deriving title from him in the position of mortgagee in possession as between plaintiff and T. or such person, and that consequently the plaintiff's action against defendant, if any, was an action to redeem.

D. C., Negombo, No. 14,357, *Murugaser Marimuttu* v. *Charles Henry de Soysa* .. 32

5.—*Usufructuary mortgage—Action to redeem—Right of heirs of mortgagor to sue without administration—Tattumaru—Possession—Tender.*

Any one of the heirs of a deceased mortgagor, who have inherited the mortgaged property, can maintain an action to redeem without letters of administration to the estate of the mortgagor.

Where a mortgage is one with possession in lieu of interest;—

Held, that the mortgagee is entitled to have his interest in the form of crops; and if the mortgagor wishes to redeem at any point of time which would deprive him of his interest in that form, the mortgagor must compensate him in money.

Held, that therefore the mortgagor cannot compel the mortgagee to deliver possession by merely tendering the principal amount of the mortgage at a time when the mortgaged property is under crop, or in the case of a mortgage of a share of a field cultivated in *tattumaru*, when it is the mortgagee's turn to cultivate.

D. C., Ratnapura, No. 3,753, *Siribohamy* v. *Rattaranhamy* 36

6.—"*Bona*"—*Construction—Promissory note—Prescription—Ordinance No. 22 of 1871, secs. 6 & 7.*

The plaintiff declared upon an instrument which, after acknowledging indebtedness in a certain sum of money, contained a promise to pay the same within 6 months from the date thereof and stipulated that in default of payment within that period the amount should be recovered with interest at a certain rate. The instrument was in the body of it called "bond", "debt bond", "debt bond of obligation", &c., and professed to make a general mortgage of the debtor's property. It bore a stamp sufficient to cover a bond of the amount in question.

Held, that the above instrument was not a "bond" within the meaning of sec. 6 of the Prescription Ordinance and that an action thereon would be prescribed in 6 years under sec. 7 of the Ordinance.

D. C. Puttalam, No. 260, *Mohamadaly Marikar* v. *Assen Naina Marikar* .. 40

7.—*Cause of action—Mortgage bond—Judgment on bond—Assignment of judgment—Action by assignee against original debtors and parties in possession of mortgaged property—Procedure.*

A mortgagee obtained a money judgment against the debtors in an action on the bond. The judgment having become dormant, the plaintiff, to whom it had been assigned, applied in the original suit, making the debtors parties to the proceeding, to revive judgment and re-issue writ, but the application having been refused, plaintiff brought a fresh action against the debtors, for the recovery of the judgment debt, and against certain others who were in possession of the mortgaged property upon a purchase subsequent to the mortgage, for the purpose of obtaining a mortgaged decree.

Held, that the refusal of the application to revive judgment in the original suit is a bar to a fresh action against the debtors for the recovery of the judgment debt.

Held, further, that, plaintiff not being able to recover any debt from the original debtors, neither can he obtain a mortgagee's decree against purchasers claiming under them.

D. C., Kandy, No. 3,065, *Soysa* v. *Pusumba* and others 93

Municipal Council.

Ruinous house—"Owner"—Ordinance No. 15 of 1862, sec. 1, sub-sec. 5.

Sub-sec. 5 of sec. 1 of Ordinance No. 15 of 1862 enacts, that "whosoever, being the owner of a house, building, or wall, shall allow the same to be in a ruinous state," &c., shall be liable to a fine.

Upon a conviction under the above enactment of a person who was agent of the owner of a house;—

Held, that the actual owner, and not an agent or representative of the owner of a house or building, is liable under the above enactment.

The Municipal Magistrate's Court, Kandy, No. 1,912, *Goonetilleke* v. *Philip* .. 21

Municipal Magistrate.

1.—*Municipal Magistrate—Chairman of the Municipal Council—Prosecution ordered by—Jurisdiction—Ordinance No. 7 of 1887, sec. 55.*

The Municipal Magistrate, who is also Chairman of the Municipal Council, ought not to try any offence where he has himself as Chairman directed the prosecution.

Court of the Municipal Magistrate Colombo, No. 4,667, *Christoffelsz* v. *Sleyma Lebbe* .. 5

Non-Suit.

See TORT.

Obstruction.

See CRIMINAL LAW, 6.

Official liquidator.

See JOINT STOCK COMPANY.

Ordinances.

No. 7 of 1840, Sec. 14.
See WILL.

No. 7 of 1840, Sec. 21.
See PARTNERSHIP, 1.
PARTNERSHIP, 2.

No. 10 of 1844, Secs. 26, 39, & 40.
See ARRACK ORDINANCE.

No. 5 of 1852.
See PROMISSORY NOTE, 2.

No. 7 of 1853, Sec. 9.
See INSOLVENCY, 1.

PAGE.

No. 7 of 1853, Section 36.
See INSOLVENCY, 2.
INSOLVENCY, 4.
No. 7 of 1853, Section 71.
See EJECTMENT, 1.
No. 7 of 1853, Section 82.
See INSOLVENCY, 3.
No. 4 of 1861, Section 100.
See JOINT STOCK COMPANY.
No. 11 of 1865, Section 19.
See MASTER AND SERVANT, 1.
No. 15 of 1866, Section 55.
See ARBITRATION.
No. 4 of 1867, Section 21.
See PRACTICE, 4.
No. 4 of 1867, Section 26.
See PRACTICE, 1.
No. 4 of 1867, Section 44.
See MORTGAGE, 3.
No. 11 of 1868, Section 81.
See PROMISSORY NOTE, 1.
No. 8 of 1871.
See MORTGAGE, 1.
No. 22 of 1871, Section 5.
See PRACTICE, 3.
No. 22 of 1871, Section 13.
See PRESCRIPTION.
No. 23 of 1871, Section 49.
See STAMPS, 1.
No. 3 of 1876, Sections 4 and 11.
See LAND ACQUISITION.
No. 5 of 1877, Section 8.
See REGISTRATION OF TITLE TO LAND.
No. 4 of 1878, Sections 10 and 13.
See MEDICAL PRACTITIONER.
No. 2 of 1883, Sections 80, 90, and 92.
See CRIMINAL LAW, 6.
Section 183.
See CRIMINAL LAW, 6.
Section 259.
See CRIMINAL LAW, 5.
Section 288.
See CRIMINAL LAW, 3.
Section 311.
See CRIMINAL LAW, 4.
Section 398.
See CRIMINAL LAW, 2.
Section 412.
See CRIMINAL LAW, 1.
Section 427.
See CRIMINAL LAW, 7.
No. 3 of 1883, Sections 9 and 226.
See CRIMINAL PROCEDURE, 4.
Section 19.
See CRIMINAL PROCEDURE, 8.
Sections 152, and 154
See CRIMINAL PROCEDURE, 2.
Section 236
See CRIMINAL PROCEDURE, 3.
Section 403.
See CRIMINAL PROCEDURE, 5.
Section 405.
See CRIMINAL PROCEDURE, 1.
Section 426.
See CRIMINAL PROCEDURE, 9.
Section 473.
See CRIMINAL PROCEDURE, 6.
No. 26 of 1885, Section 20.
See MASTER AND SERVANT 2.
No. 26 of 1885, Section 39.
See CRIMINAL PROCEDURE, 4.
No. 2 of 1887, Sections 11 and 26.
See WILL.

PAGE.

No. 7 of 1887, Section 55.
See MUNICIPAL MAGISTRATE.
No. 7 of 1887, Sections 127 and 133.
See ASSESSMENT OF RATES.
No. 11 of 1887.
See CRIMINAL LAW, 5.
No. 2 of 1889, Section 17.
See CIVIL PROCEDURE, 10.
Sections 18, 640, and 648.
See CIVIL PROCEDURE, 4.
Section 34.
See CIVIL PROCEDURE, 9.
Section 40.
See CIVIL PROCEDURE, 7.
Sections 44, 46, and 247.
See CIVIL PROCEDURE, 8.
Section 85.
See CIVIL PROCEDURE, 5.
Sections 392, 394, and 547.
See CIVIL PROCEDURE, 2.
Sections 523, 530, and 544.
See CIVIL PROCEDURE, 11.
Sections 547 and 642.
See CIVIL PROCEDURE, 6.
Section 720.
See CIVIL PROCEDURE, 3.
Section 755.
See REGISTRATION OF TITLE TO LAND
Section 756.
See CIVIL PROCEDURE, 11.
No. 3 of 1889.
See MAINTENANCE.
No. 3 of 1890.
See CIVIL PROCEDURE, 5.
STAMP, 2.
No. 22 of 1890.
See CRIMINAL PROCEDURE,

Parole Evidence.

See PARTNERSHIP, 2.

Partition.

1.—*Partition—Commissioner—Claim for remuneration—Amount awarded by Court in partition suit—Notice to parties—Estoppel—Separate action—Practice.*

The plaintiff was Commissioner appointed to partition certain lands in a partition suit, to which the defendant was a party. Upon motion made by plaintiff in the partition suit with notice to all parties, the Court awarded a certain sum as plaintiff's commission to be paid by the parties in proportion to their respective shares, there being no opposition to the motion. The plaintiff brought the present action to recover the defendant's share of the amount awarded.

Held, affirming the judgment of the District Court, that the defendant, having notice of the plaintiff's motion and making no opposition was bound by the order of the Court, and that he could not now object to the amount to be paid by him to plaintiff.

But, *held*, that the plaintiff should have proceeded in the partition suit for the recovery of the amount and should not have brought a separate action.

D. C., Colombo, No. 2,681. SILVA v. GUNATILLAKE .. ..

2.—*Partition suit—Intervention—Non-payment of costs of a previous action—Practice.*

The practice as to stay of proceedings for non-payment of costs of a former action is not appli-

PAGE.

cable to interventions in partition suits, and such interventions will be allowed and proceedings will not be stayed, notwithstanding non-payment of costs of a previous action for the same interest in land.

D. C., Galle, No. 55,488. LEWISHAMY v. TAMBYHAMY, BABONA, intervenient .. 58

Partnership.

1.—*Partnership—Action for account between partners—Parole evidence—Ordinance No. 7 of 1840, section 21.*

In an action between partners for an account of the partnership, whose capital exceeded Rs. 1,000, and which was not formed by any deed of partnership;

Held (following *D. C., Kandy*, 52,568, Vand. Rep. 195) that the prohibition against parole evidence in section 21 of Ordinance No. 7 of 1840 applied only to executory contracts, and that parole evidence was admissible to prove a partnership already dissolved, for the purposes of an action for the settlement of partnership accounts.

D. C., Ratnapura, No. 2,247½, 6 S. C. C. 119, commented on.

D. C., Galle, No. 55,354. BAWA v MOHAMADO CASIM 53

2—*Partnership—Action for account—Parole evidence—Ordinance No. 7 of 1840, section 21 sub-section 4.*

In an action for partnership account by one partner against the other, in which the partnership is denied;

Held, that, notwithstanding the provisions of the Ordinance No. 7 of 1840, parole evidence is admissible to establish the partnership, if it has already been dissolved, although the capital of the partnership exceeded Rs. 1,000.

D. C., Colombo, No. 98,398. MENDIS v. PEIRIS 98

Pleading.

See ADMINISTRATOR.
BREACH OF PROMISE OF MARRIAGE.
BUDDHIST TEMPORALITIES ORDINANCE.
CIVIL PROCEDURE, 7.
CIVIL PROCEDURE, 8.
CIVIL PROCEDURE, 10.
LEASE.
PRESCRIPTION.

Plene administravit, plea of.

See ADMINISTRATOR.

Practice.

1.—*Costs awarded to several parties—Payment to one—Joint judgment—Practice.*

Where an order for costs is made in favour of several parties, payment to or settlement with one of them constitutes a discharge as against all.

So *held* by DIAS, A. C. J.

D. C., Kegalle, No. 5,946. WATTEGAME RATEMAHATMEYA v. PEDRO PERERA and others 24

2.—*Judgment—Against two defendants—Substitution of plaintiff—"Process to enforce the judgment"—Reissue of writ—Revival of judgment against one defendant—Ordinance No. 22 of 1871, section 5—Prescription.*

Proceedings taken for the substitution of a person as judgment creditor in the room of the original plaintiff do not constitute a "process of law to enforce the judgment" within the meaning of section 5 of the Ordinance No. 22 of 1871, so as to bar the statutory presumption of satisfaction after ten years.

A writ returned by the Fiscal unexecuted may be reissued, and such reissue within ten years interrupts prescription of the judgment.

In the case of a judgment against more than one defendant, issue of process or other causes which are operative against one defendant are also effectual to keep the judgment alive against the other defendants, and a judgment cannot be revived against the one without its being revived against the others also.

D. C., Kurunegala, No. 5,476. WEERAPPA PULLE v. MEERA LEBBE and another. ABDUL CADER, substituted plaintiff. .. 55

3.—*Costs—Taxation of—Class of the case—Incidental proceedings—Scale of costs—Practice.*

When costs have been awarded in an incidental proceeding in an action, such as the matter of a claim by a third party to funds in deposit, the costs should be taxed, not according to the amount involved in the incidental proceeding, but according to the class of the original action.

D. C., Colombo, No. 98,031. ADAMJEE v. CADER LEBBE. BHAY ESSAJEE, Claimant appellant 66

See CIVIL PROCEDURE, 1.
ARBITRATION.
CIVIL PROCEDURE, 1.
CIVIL PROCEDURE, 3.
CIVIL PROCEDURE, 4.
COSTS.
CRIMINAL PROCEDURE, 2.
CRIMINAL PROCEDURE, 8.
INSOLVENCY.
LEASE.
MORTGAGE, 1.
MORTGAGE, 3.
PARTITION, 1.
PARTITION, 2.
TORT.

Preference.

See MORTGAGE, 1.

Prescription.

Prescription—Acknowledgment of debt—Promise to pay—Ordinance No 22 of 1871, section 13—Settlement of issue - Pleading.

Under section 13 of the Prescription Ordinance of 1871, an acknowledgment, to take a case out of prescription, must not only admit the debt to be due, but must involve an unconditional promise to pay or a promise to pay on a condition which has been fulfilled.

Where, after a plea of prescription had been put in, the plaint was amended by inserting an allegation that the defendant had within the prescriptive period acknowledged the debt, and promised to pay it, and no further pleading was put in by the defendant by way of answer to the amended plaint;

PAGE.

Held, per BURNSIDE, C. J., that although the document upon which the plaintiff relied as an acknowledgment to take the case out of prescription did not contain a promise to pay, yet such promise must be taken to have been admitted on the pleadings, and the plea of prescription therefore failed.

Observations by BURNSIDE, C. J., on the settlements of issues to be tried by the Court.

D. C., Anuradhapura, No. 13. APPAVUPILLAI v. FERDINANDO 69

See CIVIL PROCEDURE, 8.
MORTGAGE
PRACTICE, 1.

Proctor.

See JOINT STOCK COMPANY.

Promissory Note.

1.—*Action on promissory note—Agreement to take less than amount due—Release—Consideration—Nudum pactum—Compromise—Roman Dutch Law—Ordinance No.* 5 *of* 1852.

The plaintiff brought this action for the recovery of Rs. 622 on certain promissory notes. The defendant being about to contest the suit, the parties came to an agreement, whereby plaintiff agreed to take in full satisfaction the sum of Rs. 410, of which Rs. 200 was to be paid down, and the balance within a given time. The defendant fulfilled his part of the agreement.

Held, that the above agreement was not a bare agreement without consideration, but was in the nature of a compromise, and as such was binding on the plaintiff so as to disentitle him to recover from the defendant more than the amount agreed upon.

D. C., Kandy, No. 97,649. MUTTU CARPEN CHETTY v. FORBES CAPPER 10

2.—*Jurisdiction—Cause of action—Promissory note—Endorsement—Ordinance No.* 11 *of* 1868, *section* 81.

The endorsement of a promissory note within the territorial limits of a Court gives that Court jurisdiction in a suit on the note by the endorsee.

C. R., Colombo, No. 54,714. CADER TAMBY v OMER LEBBE 10

See MORTGAGE, 6.

Registration.

Registration—Deed of gift—Valuable consideration—Adverse interest—Priority—Ordinance No. 8 *of* 1863, *section* 39.

Under section 39 of Ordinance No 8 of 1863, a deed of gift, not being a deed for valuable consideration, does not, by reason of prior registration, obtain priority over a deed previously executed.

D. C., Negombo, No. 15,408. FERNANDO v. FONSEKA 82

See TRADE MARKS ORDINANCE.

Registration of title to land.

Registration of title to land—Money decree against owner of land—Charge upon land—Ordinance No. 5 *of* 1877, *section* 8*—Appeal—Civil Procedure Code,* 755.

Ordinance No. 5 of 1877 provides for the registration of title to land, and by section 8 enacts that "every person having or claiming to have any right, title, or interest in or to any such lands, whether in possession, reversion, remainder or, expectancy, except as monthly tenant, and whether by way of mortgage, hypothec, lien, charge, or otherwise", shall deliver a statement of his claim in writing, and other sections of the Ordinance provide for the investigation and registration of such claims.

Where a mortgagee of land, having obtained a mortgage judgment upon his bond, sold the mortgaged property, whereby a portion only of the amount of judgment was satisfied, leaving a balance still due upon the judgment, and where the mortgage sought to register a claim to other lands of the mortgagor in respect of the unsatisfied judgment;

Held, the mortgaged land having been sold, and the balance amount of the judgment being now due, as upon a mere money decree, the judgment creditor has not right, title, or interest, within the meaning of the Ordinance, in or to any other lands of the mortgagor, and is therefore not entitled to have his claim registered under the Ordinance.

Observations by BURNSIDE, C. J., and CLARENCE, J., on the question whether in an appeal from the Special Commissioner's Court a petition of appeal signed and filed by the party himself is regular.

The Special Commissioner's Court (Wellawatte) No. 219. SMITH v. WIJEYRATNE.. 44

Right of private defence.

See CRIMINAL LAW, 6.

Roman Dutch Law.

See SALE.

Ruinous house.

See MUNICIPAL COUNCIL.

Sale.

Vendor and purchaser—Trespass by a third party—Failure of action by purchaser against trespasser—Notice of such action to purchaser—Action for recovery of purchase money—Averment of want of title pleading—Roman Dutch Law.

Where a purchaser of land has failed in an action (of which he gave the vender notice) against a third party who withholds possession from the purchaser;

Held, that the purchaser's cause of action against the vendor, if any, is a breach of contract on the vendor's part in contracting to transfer that which he had no right to transfer.

Held, that in such action, as distinguished from the action available under the Roman Dutch Law, to a purchaser who has been sued and evicted by a third party in a legal proceeding of which the vendor had due notice, the absence of the vendor's right to transfer must be averred and proved.

D. C., Matara, No. 34,972. WIRASINGHE v. DIAS ABEYSINGHE 29

Secretary of the Ceylon Savings Bank.

See CIVIL PROCEDURE, 11.

PAGE.

Stamps.

1.—*Stamps—Sale of, by unlicensed vendor—"Forfeit"—Criminal or civil remedy—Ordinance No.* 23 *of* 1871, *section* 49.

Sec. 49 of the Ordinance No. 23 of 1871 enacts, that if any person other than the commissioner or government officer mentioned in the Ordinance shall sell or offer for sale any stamp without having obtained a license authorizing him in that behalf, as provided in the Ordinance, "he shall for every such offence forfeit the sum of one hundred rupees"—

Held, that under the above enactment, a person is not liable to be criminally prosecuted but only to be sued civilly and adjudged to forfeit the sum specified.

P. C., Badulla, No. 6,418. FRASER v. JOHN SILVA and another 26

2.—*Stamps—Process—Verification of service—Affidavit of indentity—Stamp Ordinance No.* 3 *of* 1890, *Schedule B., Part II.*

When process has been served on a person pointed out to the officer serving the process, the affidavit of identity to be sworn by the party so pointing out the person for service is not "an affidavit for verifying service of process" within the meaning of the exemption mentioned in Part II, of Schedule B to the Stamp Ordinance of 1890, and therefore requires to be stamped.

D. C., Kurunegala, No. 6,831. APPUHAMY v. SITENGIRALE 65

See CIVIL PROCEDURE, 5.

Tattumaru possession.

See MORTGAGE, 5.

Tavern keeper.

See ARRACK ORDINANCE.

Toddy.

See ARRACK ORDINANCE.

Tort.

Action in tort—Plea of minority—Minor appearing without guardian ad litem—Non-suit—Practice.

Where a defendant appeared to an action by proctor and pleaded minority;

Held, that the plea of minority could not be entertained, and a decree of non-suit entered upon such plea was bad, and that it was for the defendant, if he so desired, to have taken steps for the appointment of a guardian *ad litem*.

Held, per BURNSIDE, C. J., that a person can always maintain an action *in tort* against a minor without having a guardian *ad litem* appointed.

D. C., Negombo, No. 15,395. CONSTANTINU VEDERALE and others v. HENDRICK PERERA and others 31

Trade Marks.

Trade mark—"Proprietor"—User—Priority of application—Registration—Trade Marks Ordinance, 1888.

The user of a mark as a trade mark confers the right of property in it when the article it represents has acquired a general reputation by that mark in the market, and the proprietor of such trade mark is entitled to have it registered under the Trade Marks Ordinance, 1888.

D. C., Colombo (Special) No. 68. In the matter of an application for registration of a trade mark. SWAMPILLAI v. MANUELPILLAI, and

D. C., Colombo (Special) No. 70. In the matter of an application for registration of a trade mark. MANUELPILLAI v. SWAMPILLAI 15

Transfer of Case.

Additional Police Magistrate—Transfer of case—Jurisdiction.

Where an information was laid before a Police Magistrate, and, proceedings being taken up to a certain point, the case was transferred, otherwise than by order of the Supreme Court, to an Additional Police Magistrate having jurisdiction in the same district.

Held, that such transfer of the case was illegal and the second Magistrate had no jurisdiction to try the case.

P. C., Kegalle, No. 8,150. APPUHAMY v. UNDIYA and others 14

Trespass.

See CRIMINAL LAW, 7.
SALE, 1.

Vendor and Purchaser.

See SALE.

Will.

Will—Attestation—Notary practising in one language and instrument written in another—Ordinance No. 7 *of* 1840, *section* 14, *and Ordinance No.* 2 *of* 1877, *section* 11, *and section* 26 *sub-section* 10.

Section 14 of Ordinance No. 7 of 1840 enacts that no will shall be valid unless (among other things) the signature "be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses," &c.

Section 11 of Ordinance No 2 of 1877 provides, that every appointment for the office of notary shall specify "the language or languages in which he is authorized to draw, authenticate, or attest deeds or other instruments".

Held, that a notary authorized to practise in one language may properly attest an instrument written in another, writing the attestation clause in the language in which he is authorized to practise.

In the case of a will written in the Tamil language and attested by a notary authorized to practise only in the English language, the attestation clause being written in the English language;

Held, that the will was duly attested and was rightly admitted to probate.

D. C., Negombo, Testamentary, No. 4. In the matter of the Last Will and Testament of KURUKULASURIYE AUGUSTINO FERNANDO of Negombo, deceased .. 59

THE

CEYLON LAW REPORTS,

BEING

REPORTS OF CASES DECIDED

BY THE SUPREME COURT OF CEYLON.

Edited by THOMAS E. DE SAMPAYO and JAMES VANLANGENBERG, *Advocates.*

Present :—BURNSIDE, C. J., CLARENCE AND DIAS, JJ.
(*November* 26 *and December* 17, 1889, *and January* 10, 1890.)

D. C. Colombo, No. 285. { CASY LEBBE MARIKAR *v.* AYDROOS LEBBE MARIKAR. *Ex parte* M. M. ABDUL RAHMAN, Claimant.

Mortgage of moveables—Sale of mortgaged property by unsecured creditor—Claim to proceeds—Preference—Ordinance 8 *of* 1871*—Roman Dutch Law* —Mobilia non habent sequelam—*Practice.*

A mortgagee of moveables, hypothecated by an instrument in writing without delivery of possession and subsequently seized and sold under an unsecured creditor's writ, can claim in preference the proceeds sale of the property mortgaged.

The creditor under whose writ the property has been sold is not entitled to preference as against the mortgagee even in respect of the costs of his action.

The plaintiff appellant obtained judgment in this case against the defendant for Rs. 700 and costs on November 20, 1888, issued writ, and through the Fiscal seized and sold the shop goods and other effects lying in defendant's shop at Kayman's Gate. After the proceeds sale to the amount of Rs. 626·27 had been deposited in Court, the claimant respondent, who had a mortgage of the same property upon a bond dated September 17, 1888, granted by the defendant, and had sued the defendant in case D. C. Colombo No. 693 and obtained judgment for Rs. 500 and costs with a hypothecary decree, came into this case on 3rd June, 1889, and moved to draw the money deposited in Court. He made affidavit identifying the defendant and annexing thereto a copy of the decree in case No. 693, and he subsequently filed a supplementary affidavit stating "the judgment in my favour entered in D. C. Colombo No. 693 is still due and owing" and "the amount due to me was Rs. 500 with Rs. 128·60 due as costs in case No. 693". The respondent's motion was ultimately allowed on September 30, 1889, and the plaintiff appealed. The remaining facts material to this report appear in the judgment of CLARENCE, J.

Layard, S.-G., for the plaintiff, appellant.

Dornhorst, for the claimant respondent, *contra*, cited *Whittall's Case*, Wendt 217 ; *Tailby* v. *the Official Receiver*, L. R. 13 App. Cas. 523; D. C. Kandy 68,162, S. C. Civ. Min. January 12, 1878.

Cur. adv. vult.

The CHIEF JUSTICE and CLARENCE, J., who had heard the argument on November 26 disagreeing, the case was mentioned on December 17 and counsel consented that DIAS, J., should take part in the decision without further argument.

On January 10, 1890, the following judgments were delivered :—

CLARENCE, J.—In November, 1888, the plaintiff in this action obtained judgment against the defendant for Rs. 500 and costs. The defendant appealed, and on the 19th February the judgment was affirmed in appeal. The case now comes before us upon a contest between the plaintiff appellant and one Abdul Rahman respondent for the proceeds of sale of certain goods of the defendant to the action sold under the plaintiff's writ.

The sum in question, amounting to Rs. 626·27, is in Court to the credit of the cause, and is said to have been there deposited on several dates, ranging between January 3rd and March 29th of this year. The respondent claims the proceeds by virtue of a notarial instrument of hypothecation, bearing date the 17th September, 1888, whereby the plaintiff's judgment debtor purported to hypothecate to respondent "all and singular the goods wares merchandise effects and things and other the stock in trade now lying and being in my shop or boutique No. 32 at Kayman's Gate in the Pettah of Colombo and eleven glass almirahs one counter and other the furniture and fittings therein, nothing excepted, and also all such other goods merchandise effects furniture and things which hereafter in the course of my trade

shall or may be brought into or be in the said shop or boutique and in any other my place of business and also all and every the sum and sums of money due owing and payable to me as book debts as well as all such other shop debts which may accrue to me during the continuance of these presents."

Respondent sued the debtor under this obligation and on February 11th, 1889, obtained judgment for Rs. 500 and costs with a hypothec decree on the footing of the above instrument.

The goods, the sale of which by the Fiscal produced the money now in Court, are, as I understand, admitted to have been goods seized under plaintiff's writ in the debtor's shop referred to in the hypothecatory instrument. Respondent has made affidavit "that his judgment is still unsatisfied". How much is due to him under his judgment and whether he has received anything under the judgment his affidavit does not say. He was also examined in Court and did not then say how much was owing to him.

As far back as June last respondent moved for an order to draw the money in Court, claiming under his hypothec. Various proceedings, which need not now be considered, appear to have taken place on that application, and finally the application was discussed in Court between plaintiff and respondent, and the learned judge made the order from which plaintiff now appeals upholding respondent's claim under his hypothec and allowing respondent's application to be paid the money in Court.

It was argued for plaintiff in appeal that respondent has not established as against appellant, from whose levy the fund results, that any or what amount of debt is due to him, and that in any event plaintiff should have been allowed priority for the costs of obtaining the judgment under which his levy was made; and plaintiff's argument also went further and challenged *in toto* respondent's claim to these proceeds sale.

Thus the proceeding in which the order appealed from has arisen differs from the interpleader issues commonly raised in the English Courts under a Bill of Sale, inasmuch as the respondent, the party who claims by virtue of an alleged hypothec, is not claiming to exercise any right over the goods themselves. The goods had been sold months before he made his application to Court. He would seem, according to notes made by the Fiscal on his returns to plaintiff's writ, to have given the Fiscal at some time or other notice of his hypothec; but his application to the District Judge was not made till long after the sale, and it was a claim of preference on the proceeds sale of the goods.

I do not think the order of the District Judge can be supported, because the respondent has not established what particular sum is due to him from the defendant. We must, however, go deeper into the case.

Appellant contends that respondent's hypothec is invalid, and if that contention is right respondent's claim to this preference fails at once. We must take it at any rate since the Ordinance 8 of 1871, that hypothec of moveables may be made either by notarial instrument or by parol agreement accompanied by delivery of the goods. The Roman Dutch authorities do not seem to be very clear on the head of notarial conveyances made without delivery. In a case reported 3 Lorenz 49 such an instrument was, however, recognized as entitling an incumbrancer to maintain his preferent claim over the goods themselves against the assignee under the owner's insolvency, and the Ordinance of 1871 must be taken to have impliedly at any rate recognized such a hypothecation as valid if signed and registered as there mentioned. The present instrument seems, reckoning *dies non*, to have been registered in due time. In substance it purports to hypothecate all stock in trade then and hereafter to be in the defendant's then shop at Kayman's Gate or any future place of business and all present and future book debts. It is well settled that an English Bill of Sale can effectually bind the stock in trade from time to time on the debtor's premises and the case of *Tailby* v. *Official Receiver*, L.R. 13 App 523, is an authority that a Bill of Sale may pass the equitable interest in book debts incurred after the assignment whether in the mortagor's then or any other business. This is by no means a conventional general mortgage which since the Ordinance could have no operation as a charge, nor do I think that it is open to objection as too vaguely wide. It seems to be within the principle of the decision in *Tailby* v. *Official Receiver*.

But Mr. Solicitor for appellant argued that in point of fact the goods having been sold before respondent came into Court with this claim, his hypothec is gone and he can make no claim to the proceeds sale. It was argued that the goods once sold, respondent's hypothec is gone and that he can claim neither the goods nor their price, and his remedy (if any) is against the Fiscal for selling.

So far as I can gather from the sale reports filed in the paper-book of this case, the fund now in question is the proceeds of sale of shop goods and not of book debts. Now there can, I think, be no question but that if the respondent's claim to the proceeds sale of those shop goods is to be decided according to the principles of English commercial law it must fail. *Mobilia non habent sequelam.* The mortgagee has the right to prevent the goods from being sold away from him; but the goods once sold his remedy either against the goods or their proceeds is gone; though he may, perhaps, according to circumstances, have a remedy in tort against the person who by selling the mortgaged goods has thus put an end to his incumbrance. He may, if he hears of the seizure in time, come into Court upon an interpleader proceeding and so assert his incumbrance and prevent the goods from being sold away from him, but the goods once sold (unless of course they were expressly sold by arrangement, conserving his claim to payment out of the proceeds) he is too late. Unhappily, however, we have constantly in Ceylon to reckon with half-forgotten vestiges of Roman Dutch Law, and it is necessary to inquire whether there is Roman Dutch Law to the contrary of this.

We were referred in argument to *Whittall* v. *Hardie* reported twice at two different stages of the proceedings. In that case there was a notarial mortgage of a

coffee crop, the coffee was seized by another creditor and the incumbrancer obtained an interim injunction restraining that creditor and the Fiscal from selling the coffee—reported 4 S. C. R. 23. The coffee, however, had in fact, as it turned out, been sold before the injunction issued, and the case came before us again upon the incumbrancer's claim to preference over the proceeds sale—reported Wendt 217. The circumstances in that case are therefore on all fours with those in the present case.

If we were free of the letters imposed upon us by the Roman Dutch Law, I can see no reason on principle why any such claim on the part of the incumbrancer to the proceeds of sale of the goods should be sustained. On the contrary, it is to my mind unjust that a creditor who lends on the security of goods which he suffers to remain in the possession of his debtor should enjoy more than the right to prevent them being sold from him if he comes to court and interpleads in time. He has accepted the security of that which unlike land *sequelam non habet*, and to my mind he has all the advantage which he can fairly claim in the right of stopping the sale by another creditor, *plus* a remedy of action against any one who damnifies him by selling in the teeth of due notice of his incumbrance. We are bound, however, to decide the question according to the Roman Dutch Law or so much of it as has survived here to this day. In *Whittall* v. *Hardie*, in the judgment delivered on the merits at the hearing of the contention between the incumbrancer and the creditor who had sold the goods, we feel bound to uphold the incumbrancer's claim to the proceeds sale as warranted by the Roman Dutch Law. The judgment in appeal was my own, concurred in by my brother Dias. Apart from any authority which may attach to that decision of two judges of this Court I have again given to the point an anxious consideration, with the result that I am unable to arrive at any other conclusion. The Roman Dutch Law, where hypothecated property was publicly sold at suit of some other creditor, allowed the incumbrancer to claim the proceeds upon the principle *pretium succedit in locum rei.* Voet (xx. 1. 13) notes that this was so both as to moveables and immoveables. This rule came into existence at a time when the public sale was held to pass even land free of the incumbrance, and having regard to that incident of the sale, the rule was not without some justification. Many years ago our courts adopted the more sensible rule of treating the incumbrance as unaffected by the subsequent execution sale of the mortgagor's interest, but the land mortgagee still, until a comparatively recent decision, extinguished a privilege for which there was no reason maintained his claim to the proceeds sale. Now, as Voet notes, the privilege of claiming the proceeds sale when the subject of the incumbrance was sold by some unsecured creditor extended to incumbrances of moveables and immoveables alike. In the section already cited, after laying down that position, he goes on, as I understand him, to say that in hypothec constituted by delivery, by reason of the Dutch having adopted the rule *mobilia non habent sequelam*, if the incumbrancer gives up possession, his incumbrance comes to an end, right to the goods and right to preference over proceeds and all "sed cum hodierno jure inductum sit, *mobilia non habere sequelam*, * * * hinc non aliter creditori securitas in nobilibus specialiter obligatis et traditis superest, quam si ipse possession sibi traditiæ adhuc incumbat, remque teneat; ac proinde tum alienatione tum nova oppignoratione rursus alteri per debitorem eundem mediante traditione fac'a, perit creditori suum pignoris et praelationis jus, ac res alienata sine onere transit in accipientem"; and he goes on to say that where the possession of the thing pledged has reverted "sine furti vitio" to the pledgor "in concursu aliorum cre'itorem ad obœrati patrimonium non fore potiorem hunc, qui aliquando rem mobilem jure pignoris possedit, sed dein desiit possidere."

But there is nothing laid down by Voet to qualify the rule laid down as to preference for proceeds of sale, so far as it affects notarial or written hypothecations. I think therefore that, the Roman Dutch Law governing the matter, it was rightly held in *Whittall* v. *Hardie* that although the privilege which the Roman Dutch Law originally conceded to the incumbrancer of moveable or immoveable property alike—of preference to the proceeds sale where the property was sold away from him under writ of some unsecured creditor—is fairly reckoned to have ceased so far as concerns mortgages of land when an altered practice allows the mortgagee of land to retain his charge on the land in the teeth of the sale, yet when we have to do with incumbrances over moveable property created by notarial instrument, whose position has undergone no corresponding alteration, no reason is apparent for now depriving them of the privilege which undoubtedly they have enjoyed. I regret that this matter should at this day have to be decided in obedience to tenets of the law of the United Provinces.

It is now more than 30 years since Chief Justice Rowe, in the case cited from Lorenz's Reports, commented on the inexpediency of questions of this kind being decided according to the Roman Dutch Law, perpetuated by virtue of a capitulation entered into as far back as 1796 with the Dutch, whose descendants and whose capital had, as he said at that date with few exceptions been long withdrawn from the Island. Such law, the learned Chief Justice added, "being as is well known no longer the law of Holland itself and being (save where modified by our Ordinances) entirely wanting in those amendments which have within the last half century been adopted in other countries to meet the exigencies of society and commerce."

We have, however, to take the law as we find it. The Roman Dutch Law governing this matter, the respondent has a right to preference in the proceeds sale of these goods, to the length of the debt remaining due to him. The appellant's contention in that respect fails.

The appellant also contended that at any rate the appellant's costs of suit should be deducted and paid before the respondent's claim of preference can attach

to the balance. This contention also in my opinion cannot be supported. I am not aware of any instance in which upon a claim either of concurrence or preference the writholder, under whose writ the fund in Court was levied, has been allowed to deduct his costs of suit. Nor in principle can such a claim on his part be maintained. The distribution in these matters is in truth in the nature of a distribution in insolvency in which all the unsecured creditors take simply *pro rata* upon their claims for debt and costs.

The order appealed from must be set aside and the matter remitted to the District Judge with a declaration that respondent is entitled to preference over the fund in Court to the extent of any debt which may be due to him by the defendant in this action under the incumbrance contained in the deed of September, 1888. And the matter will be remanded to the District Judge in order that those concerned may take such steps as they may be advised to take with reference to that question. The costs of respondent's application in the court below and upon this appeal will be borne by appellant and respondent respectively, each bearing his own costs, for neither has wholly succeeded in his contention.

Dias, J.—This judgment must be set aside on the ground that the respondent has failed to establish what specific sum is due to him from his debtor; but as my learned brother has gone into the question involving the right of the respondent to the money now in Court, I have no hesitation in stating as my opinion that according to Dutch Law a special mortgagee of immoveable property has a right to discuss that property in satisfaction of his mortgage debt. Hypothecations of moveable property are provided for by the Ordinance 8 of 1871. According to that Ordinance such a charge can be created by a writing which need not necessarily be notarial, or by delivery of the goods hypothecated, which is the same thing as a pawn or pledge. In this case the pledge has been sold and converted into money, and according to the decisions of the Court (3 Lorenz, 46; 4 S. C. R. 23) the respondent or the pledgee did not lose his right to follow the money.

Burnside, C. J.—I consent that the case should go back, but I dissent from the proposed order sending it back.

[N. B.—In differing from the judgment of the Senior Puisne Justice, the Chief Justice stated in Court verbally that he thought the question of fact whether any, and if so what, amount was due from defendant to respondent should first be decided; and as it was not now agreed upon, he was for simply sending the case back on that question of fact without deciding on this appeal the question of law as to the right of the respondent to claim the proceeds sale in preference.—Reporter.]

Present:—Clarence and Dias, JJ.

(*September* 5 *and* 12, 1890.)

D. C. Kurunegala, No. 7,244 — S. P. A. Walleappa Chetty *v.* S. K. Kader Meera Saibo.

Moveables—Mortgage of—sale to a third party by mortgagor—seizure by mortgagee—action by a purchaser against mortgagee.

By an instrument in writing a third party purported to hypothecate to defendant "all the right title and interest in respect to all those 25 tons of ebony," which he had acquired a right to cut and remove from a certain forest, and he further covenanted as soon as the ebony was cut to carry and deliver it to defendant to be kept by defendant until redeemed by payment of the debt. He subsequently cut and sold and delivered the ebony to plaintiff, and the defendant having in an action against his mortgagor seized on sequestration the ebony in plaintiff's possession and subsequently sold it under writ the plaintiff sued defendant for tne value of the ebony.

Held that defendant had at most only a right as against his mortgagor to have the ebony delivered to him when cut and that he had no right to follow the ebony in plaintiff's possession, and was liable to plaintiff for its value.

In this action, instituted on 7th January, 1890, the libel stated in substance that plaintiff was owner of 60 logs of ebony sold to him by one Don Juan Perera by deed dated 19 November, 1889, and that on 28 November, 1889, defendant unlawfully caused the same to be seized by the fiscal under writ of sequestration issued in case No. 7,236 of the same Court, and claimed Rs. 9,000 as damages. The defendant in his answer denied the sale to plaintiff by Don Juan Perera and his ownership, pleaded that the deed referred to was fraudulently and collusively given, and averred a mortgage by Don Juan Perera to himself of 25 tons of ebony of which the 60 logs in question was a part, and justified the seizure under writ of sequestration in case No. 7,236 which he had instituted against his mortgagor. The District Judge dismissed the plaintiff's action, holding that the defendant had a right under his mortgage to seize the ebony. The plaintiff appealed.

Layard, S. G., for plaintiff appellant.

Dornhorst for defendant respondent.

Clarence, J.—One Perera under an agreement with a certain person not party to this suit acquired a right to cut (*i. e.*, fell) and take 50 tons of ebony from a certain forest, and having yet to cut and take 25 tons of this stipulated amount, Perera purported by a notarial instrument to hypothecate to defendant this yet uncut timber. After reciting the original agreement creating Perera's right, the hypothecatory instrument purported to hypotheoate to defendant "all the right title and interest of (Perera) in respect to all those 25 tons of ebony being the remainder port on or quantity out of the 50 tons appearing in the said deed of agreement which is yet to be cut and removed of and from the forest land" so and so. The purport of this seems to be that as yet the timber was not felled. Perera also covenanted as soon as the

ebony should have been cut to carry and deliver it to defendant to be kept by him until redeemed by payment of the debt. The ebony having been felled, Perera sold 60 logs to plaintiff, and we may assume that the 60 logs so sold to plaintiff included the 25 tons with which the above hypothecatory instrument purported to deal. Plaintiff took delivery of the ebony so purchased by him and carted it several miles to the nearest railway station when defendant having begun a suit against Perera got the ebony seized on sequestration, and ultimately sold it in execution of the judgment which he obtained against Perera.

Upon these facts I am of opinion that plaintiff is entitled to succeed in this action. This is not the case of an absolute transfer of the property in moveable goods by way of Bill of Sale followed by a bailment as in *Cooper* v. *Willomat.* 1 C. B. 672 and that class of cases. All that defendant acquired under his deed was at most a right as against Perera to have the 25 tons of ebony given over to him by way of pledge when cut. In the meantime, Perera having cut the ebony sold and delivered to plaintiff. Defendant had no right to follow the ebony in plaintiff's possession; and having seized it and sold it while in plaintiff's possession, he is liable to plaintiff for its value.

The judgment must be set aside and the case sent back to the District Judge in order that the District Judge may settle the sum to be awarded to plaintiff as damages, viz., the market value of the ebony taken by defendant.

Plaintiff must have his costs to date in both Courts, except that having needlessly and unsuccessfully traversed defendant's averments contained in the 9th paragraph of the defendant's answer plaintiff must pay defendant the costs of establishing these averments.

Dias, J.—I think the plaintiff is entitled to succeed in this case. He bought the ebony in question from Perera who was in possession of it. The plaintiff did not know, and had no reason to believe that the ebony was pledged by Perera to the defendant, and the defendant having allowed Perera to remain in possession of the pledge cannot complain.

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Present:—Clarence, A. C. J.

(*October* 9 *and* 16 1890.)

Court of the Municipal Magistrate Colombo, No. 4,667. } Christoffelsz v. Sleyma Lebbe.

The Municipal Magistrate—Chairman of the Municipal Council—Prosecution ordered by—Jurisdiction—Ordinance No. 7 *of* 1887, *section* 55.

The Municipal Magistrate, who is also Chairman of the Municipal Council, ought not to try any offence where he has himself as Chairman directed the prosecution.

The defendant in this case was prosecuted under section 289 of the Ceylon Penal Code for constructing a building near a street without giving the Chairman the notice required by section 198 of the Municipal Councils Ordinance 1887. The Municipal Magistrate (*H. H. Cameron*) who tried the case was also the Chairman of the Municipal Council. The complainant on the record was a Municipal Inspector and deposed in his evidence that he prosecuted by order of the Chairman, whereupon defendant's counsel (*Weinman*) objected to the Magistrate trying the case. The defendant was ultimately convicted and he appealed.

Section 55 of the Municipal Councils Ordinance 1887, provides: "In any Municipal Town wherein the Chairman receives a salary out of the Municipal Fund under section 48, such Chairman shall be *ex officio* the Municipal Magistrate. * * * The Municipal Magistrate shall hear, try, and determine any offence committed within the Municipality in breach of any Municipal bye-laws lawfully enacted, or under this Ordinance" or any of the Ordinances enumerated in that section.

Section 277 enacts: "The Chairman may direct any prosecution for any nuisance whatsoever, and may order proceedings to be taken for the recovery of any fines and penalties, and for the punishment of any persons offending against the provisions of this Ordinance".

Dornhorst (*Weinman* and *Sampayo* with him) for defendant appellant. The Municipal Magistrate had no jurisdiction to try this case. Section 497 of the Criminal Procedure Code enacts that no Magistrate shall try a case in which he is personally interested, and it is submitted that the Municipal Magistrate having, as Chairman of the Council, directed the prosecution, was personally interested in it. Further, as to interest, section 498 of the Criminal Procedure Code directs that the question whether a Magistrate is personally interested in a case shall be decided by the principles of the law of England applicable to the same question in England. The Magistrate in such a case as this would be disqualified according to the principles of the English Law. The general authority given to the Chairman by section 55 of the Municipal Councils Ordinance 1887 to try offences as Municipal Magistrate does not authorise him to entertain a prosecution directed by himself. *The Queen* v. *Milledge*, L. R. 4 Q. B. D. 332, where two justices, who were also members of a Town Council which had passed a resolution that steps should be taken for the removal of a nuisance and took out a summons against the offender, were held disqualified from sitting at the hearing of the summons. Also *The Queen* v. *Gibbon*, L. R. 6 Q. B. D. 168, where, an information having been preferred on behalf of a Municipal corporation by an officer thereof and summons having been issued upon it by a justice who was also an alderman and member of the corporation, it was held that the summons could not be heard even by justices who were not connected with the corporation, because it had been issued by one who was virtually prosecutor.

Counsel then argued the appeal on the merits

Cur. adv. vult.

On 16th October 1890, the following judgment was delivered:—

Clarence, A. C. J.—In this case the complainant, a Municipal Inspector, deposed that he prosecuted by

order of the Chairman. Upon this the defendant's counsel objected to the Chairman as Municipal Magistrate trying the case, and the same point was argued on defendant's behalf in appeal before me.

I regret that I have to determine the point thus raised with the assistance of argument upon one side only. Under consideration of the matter I think that the objection is entitled to succeed.

The 55th section of the Municipal Councils Ordinance 1887 directs that "the Municipal Magistrate shall hear, try, and determine any offence committed within the Municipality in breach of any Municipal bye-law or under this Ordinance". I read this authority to try "any offence" against bye-law or Ordinance as a general authority to dispose of Municipal prosecutions, trenching upon the well known rule of law that no judge shall adjudicate a matter in which he has a personal interest. Without positive legislative enactment the Municipal Chairman could not, except of course by consent, have sat to dispose of a prosecution instituted on behalf of the Municipality for a breach of the provisions of the Ordinance. But the rule against a judge deciding a matter in which he is personally interested is one of very great moment; and although upon the balance of public convenience it has been deemed from time to time advisable to trench upon it in matters of the kind now concerned, it is our duty to guard the general principle jealously and scrutinise such legislative exceptions closely. And my opinion is that the Ordinance was never meant to trench upon this important general rule of law further than this—that the Municipal Magistrate is thereby empowered to try charges *preferred* on behalf of the Municipality, which his position as Municipal Chairman would on the general principle forbid his trying. It is easy to see the considerations of general convenience which induce such legislation. But I cannot read the Ordinance as going further than this. In any case in which the Chairman may have a special concern over and above his general interest as head of the Municipality, I take the general rule to be still in force. In the present case the Chairman had a special interest in the matter, having directed the prosecution, and consequently, upon the view I take, the defendant was within his rights in objecting to the Chairman trying the case. No practical inconvenience can arise from this result, because the ordinary Police Court is available. I set aside the conviction and quash the whole proceedings.

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Present:—Burnside, C. J., and Dias, J.
(*February* 20 *and March* 14, 1890.)

D. C. Matara, No. 35,584. } Dissanaike v. Dias.

Fidei-commissum—*Deed of gift—Interpretation.*

The owner of certain land granted it, by way of donation *inter vivos*, to a person "his heirs, executors, and administrators," subject to the condition "that in the event of the donee happening to die without specially disposing of the aforesaid property by will or otherwise, or after marriage without lawful children or their legal descendants, it is to be clearly understood that no part of the gift hereby granted can be included in the community of goods of his wife but that the same shall revert to the brothers and sisters of the donee or their lawful descendants *pro rata* according to the law of inheritance".

Held that the property vested absolutely in the donee, and that the same having been mortgaged by the donee and been sold under the mortgagee's writ after the donee's death, the purchaser acquired a good title as against the brothers and sisters of the donee.

The original owner of the property was Dona Maria Tillekeratne, who gifted it to her nephew D. H. Tillekeratne by a deed of gift dated September 15, 1839, with the above proviso. D. H. Tillekeratne during his life time mortgaged it and subsequently died without wife or children. After his death the mortgagee instituted a case against the administrator of D. H. Tillekeratne, and under writ issued in that case the property was sold by the Fiscal and purchased by the vendor to plaintiff. The present action was brought in ejectment against the defendant, who claimed to be in possession under certain parties who derived their title through the brothers and sisters of D. H. Tillekeratne. The District Judge (*E. F. Hopkins*) gave judgment for the plaintiff, remarking as follows:—"It is sought for defendant to establish a *fidei-commissum* in favour of the brothers and sisters of D. H. Tillekeratne. I cannot agree with this construction. From the whole tenor of the deed it is clear to me that the donor intended an absolute and unconditional gift in favour of the donee, subject to one restriction, viz., that in no case should any part of the property donated fall *ab intestato* to the heirs of the donee's wife. Without such reservation, half of this property would go to the heirs of the wife in the event of her dying without legal issue. It is very clear that the object of the donee was to prevent any such contingency. I cannot at all hold that the insertion of the words "the same shall revert to the brothers and sisters of the said D. H. Tillekeratne", creates any *fidei-commissum*. The effect of these words is merely to convey to such persons a right as against the heirs of the wife. The defendant appealed from this judgment.

Browne for defendant appellant.

Dornhorst for plaintiff respondent.

On March 14, 1890, the following judgments were delivered:—

Burnside, C. J.—The question which we have to decide in this case is a very simple one. It is admitted that Dona Maria Tillekeratne was the original owner of the land, the subject of this action. She by a deed of gift dated September, 1839, gave and granted it, by way of donation *inter vivos*, unto her nephew Henry Dissanaike Tillekeratne, his heirs, executors, and administrators, with a proviso "that in the event of the said donee happening to die without specially disposing of the aforesaid property by will or otherwise, or after marriage without lawful children or their legal descendants, it is to be clearly understood that no part of the gift hereby granted can be included in the community of goods of the estate of his

wife, but that the same shall revert to the brothers and sisters of him the said donee, or their lawful descendants *pro rata*, according to the laws of inheritance".

The plaintiff claims as a vendee through the donee, the defendant appellant claims in right of certain heirs of the donee's brothers and sisters who they say became entitled as the ultimate donees under a *fidei-commissum* in their favour created by the deed. After the deed of gift had been made, the donee Tillekeratne mortgaged the premises, and upon his death the property was sold in suit against his administrator and the plaintiff became the purchaser. I quite agree with the judgment of the District Judge that the title which the donee took in the land was an absolute estate, subject only to the right of the donee's brothers and sisters to inherit in lieu of the collateral heirs of his wife, and as the donee did in his lifetime exercise the right of ownership by disposing of the estate by mortgage, his having done so defeated the right of his brothers and sisters to any interest in it, and it became liable to the mortgage debt which encumbered it, and was rightly sold in payment of the debt. Judgment affirmed.

Dias, J.—The land in dispute was the property of Dona Maria Tillekeratne, who by a deed of 15th September, 1839, conveyed it by way of gift to D. H. Tillekeratne, his heirs, executors, and administrators, subject, however, to the condition that in the event of the death of the donee without specially disposing of the subject of the gift by will or otherwise or in the event of his death after marriage without lawful issue or their legal descendants, no part of the property should pass to his widow by virtue of the community of goods between husband and wife, but that the same should pass to the brothers and sisters of the donee or their lawful descendants. The object of the donor is very plain. She gave the property to the donee and his legitimate children absolutely and excluded the rights of the donee's widow by virtue of the community of property. The donee died without leaving either wife or children, and it was contended for the defendants, who claim under the brothers and sisters of the donee, that the donee having died without issue the property passed to them by virtue of the deed of 1839. This contention cannot be upheld, because the gift being an absolute gift to D. H. Tillekeratne, and he having failed to dispose of it during his lifetime, it passed to his administrator on his death and was seized on a creditor's writ against the administrator and sold by the Fiscal and bought by the plaintiff's vendor. The defendants have entirely misapprehended the effect of the deed of 1839, but the District Judge took a correct view of it and gave plaintiff judgment, which is affirmed.

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Present:—Clarence, A. C. J., and Dias, J.

(*October* 8 *and* 16, 1890.)

D. C. Kandy, No. 2,499. } Ramen Chetty, v. Abdul Raheman Saibo and another.

Arbitration—compulsory reference—matters of account—action against partners—issue of partnership—Ordinance No. 15 *of* 1866 §5*—appeal—practice.*

Where a case related to matters of account as well as issues which are not matters of account—

Held that the Court cannot, under section 5 of the Arbitration Ordinance, compulsorily refer all the matters in dispute to arbitration but only the matters of account, and an award made on such reference is on that ground bad.

Held, also, that a party, who has not objected to the order of reference by way of interlocutory appeal, is not precluded from raising the objection upon the motion for judgment in terms of the award.

The arbitrator, to whom the whole matters in dispute had been referred, in his award did not in express terms decide that the two defendants were not partners, but he held that the plaintiff had failed to establish his claim against the second defendant and thereupon dismissed plaintiff's action as against him. On motion made by plaintiff to have judgment entered up the first defendant opposed. The learned District Judge (*Lawrie*) in making the order appealed from and refusing the motion thought that the arbitrator had decided the question whether the second defendant was a partner and suggested that the proper course was to accept the award as conclusive on the question of accounts and to allow either party if so advised to move that the case be set down for argument and trial on the other question, whether the second defendant was liable as partner. The plaintiff appealed from the order refusing his motion to enter up judgment.

The remaining facts material to this report appear in the judgment.

Dornhorst, for plaintiff appellant, cited *Rogers* v. *Kearns*, 29 L. J. Ex. 328.

Wendt for defendant respondent.

Cur. adv. vult.

On October 16th, 1890, the following judgment was delivered:—

Clarence, A. C. J.—Plaintiff sues two defendants as partners, claiming from them a sum of money as due for goods sold and delivered. The defendants answer separately. Both defendants deny the partnership. First defendant admits having had dealings with plaintiff, disputes the correctness of plaintiff's accounts filed, sets up another version of the account, and avers payment of that account. Second defendant denies having purchased goods from plaintiff.

A trial of this case was begun before the learned District Judge and adjourned for want of time. Afterwards the case again came on before another gentleman as acting District Judge, and the acting District Judge then minuted this order:—

" The accounts are intricate and of a complicated character, and the case cannot be tried in the ordinary way."

It is therefore ordered that the matters in dispute wholly, including the question of costs, be referred to arbitration. The plaintiff agrees to it, but the defendants object and refuse to appoint an arbitrator.

The Court therefore refers the whole matter in dispute to the sole arbitration of Mr. Siddic Lebbe, who should arbitrate on the issues raised on the pleadings and make order as to costs as he thinks fit. Such award to be made within one month from this date and to be final.

(Signed) OWEN MORGAN,
A. D. J."

The arbitrator so appointed afterwards brought in an award by which he dismissed plaintiff's action with costs as against 2nd defendant, and awarded to plaintiff a certain sum of money, being the amount claimed in the libel, as due from 1st defendant with costs.

Thereafter plaintiff moving to have judgment entered up in terms of the award, the learned District Judge, who had by that time resumed his duties, refused that motion, holding that the compulsory reference to arbitration was *ultra vires* inasmuch as it embraced matters other than matters of account. From this refusal plaintiff appeals.

In my opinion the learned District Judge was right in refusing the motion, and the appeal fails. The 5th section of the Arbitration Ordinance contemplates compulsory reference only of matters of account. "If it shall appear to the satisfaction of the court that the action relates wholly or in part to matters of mere account of an intricate and complicated character, which cannot be conveniently tried in the ordinary way", the Court is empowered to refer such matters either wholly or in part to arbitration. In the present case the pleadings disclosed the issue whether the defendants traded as partners, which is not a matter of account. The acting District Judge by referring to arbitration the whole matter in dispute referred matters which he had no right to refer. It was however suggested that the defendants should have appealed by way of interlocutory appeal against the order of reference, and not having done so cannot now resist the plaintiff's motion for judgment in terms of the award by setting up the impropriety of the reference. They might have appealed no doubt, but not having chosen to delay the proceedings at that stage by an appeal, they are still entitled to raise the objection now. It is not in every case that a party who has a right to appeal from an interlocutory order is bound to appeal or give up the point involved, and in *Cameron* v. *Fraser* 4 Moore P. C. 1, the Privy Council pointed out the great inconvenience to which a contrary rule would lead. That case strongly resembles the present.

We dismiss the appeal with costs, but we express no further opinion on matters suggested in the learned District Judge's note.

DIAS, J., concurred.

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Present:—BURNSIDE, C. J., AND CLARENCE AND DIAS, JJ.

(*July* 4 *and* 25, *and August* 14, 1890.)

D. C. Colombo, No. 1266. } ARUNACHALAM *v.* PIERIS.

Fiscal—writ-holder in his private capacity—writ issued to Secretary of Court under section 26 *of Ordinance No.* 4 *of* 1867*—duty of such Secretary—negligence by—irregularity—parate execution—reissue of writ—practice.*

The judgment creditor, plaintiff, being himself Fiscal, the Secretary of the Court was appointed to execute writ, and the same was issued to him for execution accordingly. Property was seized and sold, but the purchaser made default but no security was taken from him. The property was then resold and purchased by the plaintiff for an amount less than that of the original sale and leaving still a balance under the judgment. No parate writ was applied for in time or issued against the first purchaser.

Held, that the plaintiff was entitled to have the writ reissued for the recovery of the balance amount due under the judgment.

Held, by CLARENCE and DIAS JJ., that the duty delegated by the Court to the Secretary included the incidental power of taking security from any purchaser and of issuing parate execution.

The plaintiff obtained judgment on the 19th March 1889 against the defendant on a mortgage bond for Rs. 690·30, took out execution, and seized the mortgaged property; but as the plaintiff was himself the Fiscal, on the 19th June 1889 the Court at the plaintiff's instance appointed the Secretary of the Court under section 26 of the Fiscals Ordinance to carry out the sale. The Secretary held the sale, and the property was purchased by one Karuneratne for Rs. 565·00. The purchaser made a deposit of Rs. 120, but the Secretary failed to take security as required for the payment of the balance purchase money. Rs. 108·20 out of the amount paid down was subsequently drawn by the plaintiff. The purchaser having made default in the payment of the balance, the writ was reissued and the Secretary resold the property when it was purchased by the plaintiff himself for Rs. 50. The plaintiff got credit for this amount and a conveyance in his favour after notice to the defendant. The writ having been reissued at the plaintiff's instance for the balance still due, the defendant moved to recall the writ which had reissued and under which certain land had been seized, and to release the seizure.

The District Judge (*C. L. Ferdinands*) re-called the writ on the ground that it was plaintiff's duty in his capacity as Fiscal to have taken out parate execution against the defaulting purchaser, and that the defendant having been prejudiced by the neglect of the plaintiff was entitled to have the writ re-called. The plaintiff appealed from this order.

Dornhorst for plaintiff appellant.

Browne (*Weinman* with him) for defendant respondent.

The appeal first came on for argument before BURNSIDE, C. J., and CLARENCE, J. on July 4, 1890. But their Lordships disagreeing as to the effective order to be made, the case came before the Full Court on July 25, 1890, when the counsel agreed that DIAS, J. should take part in the judgment without further argument.

On August 14, 1890, the following judgments were delivered :—

BURNSIDE, C. J.—I do not think the grounds on which this order has been made are in accordance with

the law, which perhaps is all that we have to do with, but I do not think we should.

It is not denied that a balance is due on the plaintiff's judgment, and, that being so, *prima facie* the writ should go.

Many questions, however, of much importance suggest themselves. The first is, in what position did the Secretary of the Court, who was appointed by the Court to execute the writ of execution issued at the suit of the plaintiff, who was Fiscal, stand towards the plaintiff as Fiscal? The section 26 of the Fiscal's Ordinance authorises a Court, when for just cause a Fiscal should not be required to serve or execute process, to name and appoint some other fit person to *serve, execute*, and *return* the process. Now, in this case the order of the Court was that the "writ be issued to the Secretary". Was this a compliance with the Ordinance; and if it were, what was the Secretary bound to do? Was he bound to issue parate execution on the failure of the purchaser, or was he *functus officio* when he returned the writ after sale? Then again, was he bound to, or could he, even under authority from the Court, re-sell after he had accepted a purchaser and returned the writ? It appears that not only did he re-sell, but he re-sold before the period of credit, which the purchaser is given by the Ordinance, had expired. Then, the writ having been returned, is it possible to re-issue it to him without a fresh delegation by the Court? With these points in view, which we cannot decide on the materials before us, I think it best simply to set aside the Judge's order refusing process and discharge the rule, leaving the question *res integra* to be dealt with by the District Court, if it is again brought before it, with knowledge of the important points to which we have referred. I would give no costs.

CLARENCE, J.—The plaintiff sued on a mortgage and obtained a mortgagee's judgment and decree for Rs. 690·30 and certain interest and costs in February, 1889. Plaintiff being at the time himself the Fiscal, the District Judge made an order under section 26 of the Fiscal's Ordinance, that the Secretary of the District Court should execute the writ issued under plaintiff's judgment. The Secretary accordingly held a sale, at which the mortgaged property was knocked down to a purchaser for Rs. 565. Under section 49 the purchaser should have paid down one-fourth of his purchase money, and given security for payment of the balance within two months. The purchaser paid down Rs. 120, rather less than the required one-fourth, but no security was taken from him and he has never paid the balance. The sale took place on the 19th October. On the 14th December the Secretary held a re-sale, at which the property was knocked down to the plaintiff himself for Rs. 50, and the plaintiff on notice to the defendant has had a conveyance. The plaintiff thereupon obtained re-issue of writ for the balance of his judgment debt after deducting sums of Rs. 108·20 and Rs. 50 respectively drawn by and credited to him under the above proceedings. The plaintiff now appeals from an order of the District Court made at the defendant's instance re-calling the writ for balance claimed under the judgment.

In my opinion this order cannot be supported. No objection was made to the re-sale by the defendant on any score of irregularity under section 53 of the Ordinance. It would indeed appear from the dates above quoted that the re-sale was made about five days before the two months had run out. No objection, however, seems to have been raised by the defendant on this or any other point. Neither did the defendant or the plaintiff call attention to the Secretary's omission to take security from the first purchaser. The duty delegated by the District Court to the Secretary clearly included the incidental power of issuing parate execution (if necessary) under the writ. He did not issue parate execution, and it is now impossible that parate execution should issue, the proper time having gone by. The defendant cannot upon this proceeding avail himself of any contention, that the plaintiff is responsible for the non-issue of parate execution, the conduct of the writ having expressly been taken by the Court out of plaintiff's hands. We have, therefore, simply these facts. The plaintiff's judgment is unsatisfied, the first writ not having produced enough. Had the first purchaser been compelled to pay up his purchase money in full, the deficit would have been but small. He made default, however, and it is now impossible to obtain anything more from him by parate execution. This being so, I can see nothing whatever disentitling the plaintiff to re-issue his writ for the balance of his debt.

I therefore think that the order should be set aside, plaintiff receiving his costs thereof in both courts, and that the case should be sent back to the District Court with directions to compute the balance due to plaintiff under his judgment, and re-issue the writ accordingly.

DIAS, J.—I am of opinion that the plaintiff is entitled to have his writ carried out. The judgment is still unsatisfied, and the objection to its enforcement by writ are (1) that plaintiff did not issue parate execution against the first purchaser who was in default, (2) that the Fiscal failed to take security from the first purchaser for the balance of the unpaid purchase money. The plaintiff himself being the Fiscal for the Western Province, the Secretary of the Court was nominated Fiscal to carry out the writ as provided by the Ordinance. So the Fiscal, who carried out the writ, was the Secretary of the District Court of Colombo. The plaintiff on the record being the Fiscal, is a mere accident. I must look upon the Secretary of the Court as the Fiscal. Now, under section 49 of the Ordinance the security is to be taken by the Fiscal who had charge of the writ, and parate execution under section 50 is to be issued by the same party. The omission to do either of these acts is no fault of the plaintiff, and if the defendant is prejudiced by the neglect of the Secretary Fiscal, he has his remedy against him, but it is no defence against the plaintiff to whom admittedly a balance is due on the judgment. The order appealed from is an order to recall the writ already issued, and to release the property already seized. This order I would set aside with costs. The writ of course will be proceeded with in due course.

Present:— BURNSIDE, C. J.

(June 19 *and* 25, 1889.)

C. R. Colombo, No. 54,714. } CADER TAMBY v. OMER LEBBE.

Jurisdiction—cause of action—promissory note—endorsement—Ordinance No. 11 *of* 1868, *section* 81.

The endorsement of a promissory note within the territorial limits of a court gives that court jurisdiction in a suit on the note by the endorsee.

The plaintiff as endorsee of a promissory note for Rs. 97·50 brought this action against the defendant as maker in the Court of Requests, Colombo. The defendant was a resident of Galollowe in the District of Negombo, and the note was made at Minuangoda in the same district. The endorsement to the plaintiff by the payee was made at Colombo. The defendant pleaded to the jurisdiction. The Commissioner held that the Court had jurisdiction, and gave judgment for the plaintiff, and the defendant appealed.

Pereira for defendant appellant.

Cur. adv. vult.

On June 25, 1889, the appeal was dismissed :—

BURNSIDE, C. J.—The note in question was endorsed to the plaintiff in Colombo. This gives the Court of Requests of Colombo jurisdiction in the suit on the note.

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Present :—CLARENCE, A. C. J.

(*October* 16, 23, *and* 30, 1890.)

P. C. Panadura, No. 2,918. } FERNANDO v. GIMANIS and another.

Appeal—charge on two counts—sentence of one month's imprisonment on each count—Criminal Procedure Code, section 405.

Where a Police Court sentences a defendant to imprisonment for one month on each of two counts of a charge framed against him, an appeal lies at the instance of the defendant under section 405 of the Criminal Procedure Code.

In this case there were two defendants, husband and wife. The Police Magistrate formulated two charges against the 1st defendant : (1) wilfully exposing his person in an indecent manner under sub-section 1 of section 4 of Ordinance No. 4 of 1841, and (2) intentionally insulting the complainant under section 484 of the Penal Code ; and one charge against the 2nd defendant—theft of a coconut under section 368 of the Penal Code. The defendants being convicted, the Police Magistrate sentenced the 1st defendant to imprisonment for one month on each count of the charge formulated against him, and the 2nd defendant to imprisonment for one month on the charge formulated against her. Both the defendants appealed.

Dornhorst (*Peiris* with him) for defendants appellants.

Wendt for complainant respondent.

The appeal came on for hearing on October 16, 1890, and judgment having been reserved, CLARENCE, A. C. J., on October 23, dismissed the appeal. But subsequently the appellants' counsel having drawn the attention of the learned Acting Chief Justice to the double sentence passed on the 1st defendant, the following judgment was delivered on October 30, 1890 :—

CLARENCE, A. C. J.—In this case the appeal of the 2nd defendant is rejected, the sentence being under the appealable limit, there being no point of law, and the Magistrate not having noted that he gave leave to appeal. The 1st defendant has been sentenced to a month's rigorous imprisonment on each count of the charge—two months in all. That is an appealable sentence. I see no reason whatever to interfere with the sentence on the second count, but I am not prepared to affirm a sentence of one month's rigorous imprisonment on the first count, viz., that for stealing one cocoanut.* The sentence on the first count will be a fine of Rs. 10, or in default one month's rigorous imprisonment.

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Present:—CLARENCE, A. C. J., and DIAS, J.

(*July* 17 *and* 24, 1888.)

D. C. Kandy, No. 97,649. } MUTTU CARPEN CHETTY v. FORBES CAPPER.

*Action on promissory notes—agreement to take less than amount due—release—consideration—*nudum pactum*—compromise—Roman Dutch Law—Ordinance No.* 5 *of* 1852.

The plaintiff brought this action for the recovery of Rs. 622 on certain promissory notes. The defendant being about to contest the suit, the parties came to an agreement, whereby plaintiff agreed to take in full satisfaction the sum of Rs. 410, of which Rs. 200 was to be paid down and the balance within a given time. The defendant fulfilled his part of the agreement.

Held that the above agreement was not a bare agreement without consideration, but was in the nature of a compromise, and as such was binding on the plaintiff so as to disentitle him to recover from the defendant more than the amount agreed upon.

The libel was instituted by plaintiff on October 6, 1886, for the recovery of Rs. 622 then due on three promissory notes and for further interest and costs. The defendant was in default of answering, and plaintiff took out a rule *nisi* for judgment by default returnable on 21st February, 1887. On February 18, however, the parties entered into the agreement hereinafter mentioned. But on February 21 plaintiff moved to make the rule absolute, and defendant not appearing, the rule was made absolute accordingly and judgment was entered for Rs. 622 with further interest and costs. Thereafter plaintiff issued writ and seized defendant's property.

On November 6, 1887, the defendant submitted an affidavit to the effect that on February 18 the plaintiff had agreed in writing to reduce his claim to Rs. 410 in consideration of Rs. 200 then paid to him by defendant,

* This is an error, the first count being one for indecent exposure of persons as noted in the above report. —REPORTER.

and a further sum of Rs. 210 agreed to be paid on or before May 15; that in April the plaintiff purchased from defendant certain cattle for the price of Rs. 95, which plaintiff credited to defendant in reduction of the said sum of Rs. 210; and that on May 15 defendant tendered to plaintiff the remaining sum of Rs. 115, which plaintiff refused to accept. The agreement referred to was signed by plaintiff and was as follows, "I argee to receive the sum of Rs. 410 for the claim, interest, and costs, out of which amount I have received by cash Rs 40. by an order of the Ceylon Company Limited Rs. 60, and by S. Mohamadaly Hadjiar Rs. 100—total Rs. 200—and the balance Rs. 210 to be paid on or before 15th May, 1887, and in failure to pay the balance amount the whole amount would be recovered as judgment." Upon these materials, defendant, bringing into Court the sum of Rs. 115, obtained a rule *nisi* to shew cause why plaintiff should not accept the sum of Rs. 115 so deposited in Court in full satisfaction of his claim, and why satisfaction of the judgment obtained by plaintiff should not be entered of record.

On December 2, 1887, on the discussion of the above rule, further evidence was taken, the defendant deposing, *inter alia*, that he "was going to defend this action" and that afterwards the parties came to the agreement as above. The District Judge (A. C. Lawrie) held on the facts substantially as sworn to by defendant and made the defendant's rule absolute, but awarded no costs. From this order both parties appealed—the defendant in respect of the order as to costs, and the plaintiff in respect of the whole order.

Dornhorst for plaintiff appellant. This being an action on promissory notes, the English, and not the Roman Dutch Law, will govern this matter. The decision in Grenier (1873) 31 will therefore not apply. Under English Law the agreement is bad for want of consideration, *Cumber v. Wane*, 1 Smith's Leading Cases 367; *Foakes v. Beer*, L. R. 9 App. 605. Nor can the transaction disclosed here be brought within the exception engrafted on the law by such cases as *Sibree v Tripp*, 15 M. and W. 23; and *Goddard v. O'Brien* L. R. 9. Q. B. D. 37, which are fully discussed in Anson's Contracts pp. 83, 84.

Browne for defendant appellant. Under the Roman Dutch Law, which it is submitted governs this matter, a release requires no consideration, *Wickremesekere v. Tatham*, Grenier (1873) 31. Even under the English Law a debt due on a promissory note may be expressly waived without consideration, *Foster v. Dawber*, 6 Ex. 851. It is also submitted that the defendant having succeeded in his contention in the Court below the District Judge was wrong in disallowing his costs.

Dornhorst in reply.

Cur. adv. vult.

On July 24, 1888, the following judgments were delivered:—

CLARENCE, A. C. J.—If this appeal had to be decided by determining the naked question, which received some argument at the Bar, viz, whether a bare agreement to release a liquid indebtedness, founded on an overdue promissory note, on payment of a smaller sum, is, under the law of this country, *nudum pactum* for want of consideration, I should have desired to hear further argument upon the authorities. If the matter be governed by the Roman Dutch Law, no consideration would be needed; but if, under the Ordinance No. 5 of 1852, the English Law is to be applied, we should have to consider authorities carefully. The decision in *Cumber v. Wane*, so severely criticised in Smith's Leading Cases, and the earlier decision in *Pinnel's Case*, 5 Co. Rep. 117, were considered by the House of Lords in *Foakes v. Beer*, L. R. 9 App. 605, when their lordships definitively declined to over-rule the doctrine laid down in *Pinnel's Case*. We must take it as now settled English Law that a bare agreement without consideration to release a debt on payment down, or by instalment, of a lesser sum (the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors, is not binding in law. In *Foster v. Dawber*, 6 Ex. 839, Lord Wensleydale laid it down as a part of the law merchant that the obligation on a bill of exchange or promissory note may be discharged by express waiver, and that whether the liability is between immediate or distant parties. In *Wickremesekere v. Tatham*, Grenier (1873) 31, Sir Edward Creasy seems to have regarded this as a ruling that no consideration was necessary. In *McManus v. Bark*, L. R. 5 Ex. 63, however, which was an action on a promissory note, it was held by the Court of Exchequer (Kelly C. B. and Martin, Channell and Pigott B. B.) that an agreement to accept repayment of £520 due on the note by quarterly instalments of £25 with interest, was no defence to an action on the note, by reason of there being no consideration for the agreement. *Foster v. Dawber* had been cited in that case.

But whatever might have been the doctrine applicable, had this been the case of a simple and bare agreement to release a debt due on a promissory note upon payment of a lesser sum by a given time, I think the facts are not quite that.

In this action the plaintiff sued on three notes aggregating to Rs. 600·12. The action was instituted in October, 1886. Defendant did not appear, and plaintiff on February 2, 1887, obtained a rule *nisi* for judgment by default. Defendant was about to contest the matter, but on the 18th February the parties met and entered into the agreement now in question. Three days after that plaintiff had judgment by default entered up for Rs. 622. I see no reason to doubt the soundness of the District Judge's finding, that within the time allowed by the agreement plaintiff bought from defendant cattle at a price of Rs. 95, and that defendant tendered, also within time, the remaining Rs. 115 payable under the agreement. Plaintiff refused to accept.

Now, the case as put by defendant, and in this respect he is not contradicted by plaintiff, is scarcely that of a bare agreement to take a smaller sum in satisfaction of a liquid debt due on promissory notes. Defendant was about to contest plaintiff's claim on the notes, and the arrangement made between them seems rather to have been that of a compromise. In that view the case falls within the principle acted on in *Cook v. Wright*, 1 B. & S. 559, and so the agreement is good. There is, of course, the technical difficulty that plaintiff after entering into the agreement above men-

tioned proceded to enter up judgment for the larger sum.

Substantially, however, the District Court has done justice by preventing a plaintiff from recovering more than the amount agreed upon; and this being so, I see no reason to interfere on plaintiff's appeal. I also think that we should not disturb the District Judge's order as to costs.

DIAS J.—I wish to express no opinion on the question of law raised at the argument. I simply affirm the judgment, as the agreement disclosed in the proceedings is good and binding between the parties.

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Present:—BURNSIDE, C. J., and CLARENCE and DIAS, JJ.

(*June* 27, *July* 25, *and August* 14, 1890.)

D. C. Badulla, No. 26,672. { MUTTAPPA CHETTY and another. v. KIDURU MAHAMADOE and another.

Sub-mortgage of mortgage bond—sale and assignment of bond by Fiscal—satisfaction of judgment—Ordinance No. 4 of 1867, section 44—practice.

The plaintiffs sued 1st defendant as principal and 2nd defendant as surety for the recovery of Rs. 750 due upon a bond, whereby 1st defendant mortgaged as security for the debt a mortgage bond for a similar amount in his favour by A. and M., containing a mortgage of certain lands. Upon judgment obtained, plaintiffs issued writ and sold, *inter alia*, A. and M.'s bond and became the purchasers thereof for Rs. 100, and obtained an assignment of the bond from the Fiscal. Thereafter plaintiffs received from A. and M. in full satisfaction the sum of Rs. 500, being less than the amount then due on their bond. The judgment in in this case having subsequently become dormant, plaintiffs, crediting defendants with the amount of the purchase money of the bond and certain other levies, took proceedings to revive judgment for the balance still due. The 1st defendant being present and showing no cause, the judgment was revived accordingly and writ re-issued.

Held, per CLARENCE and DIAS JJ. (*dissentienet* BURNSIDE, C. J.) that A. and M.'s bond mortgaged by the 1st defendant was properly seized and sold in execution and the plaintiffs were not bound to follow the procedure laid down in section 44 of the Fiscals Ordinance for the purpose of realising the money due thereon.

Held also that by the sale and assignment of the bond to plaintiffs all the interest of the 1st defendant therein absolutely vested in plaintiffs, and the 1st defendant was neither discharged from his liability under the judgment, by reason of the plaintiffs discharging the original mortgagors upon receiving part of the amount due on their bond, nor entitled to be credited with the sum so received.

The plaintiffs arrested 1st defendant upon the writ issued on the revived judgment and moved that he be committed. The 1st defendant in shewing cause submitted an affidavit stating, *inter alia*, that at the time of his mortgaging to plaintiffs the bond in his favour there was due thereon the whole principal (*i.e.* Rs. 750) and interest amounting to Rs. 367, that his right title and interest in the bond was sold by the Fiscal without his knowledge and was purchased by the plaintiffs for Rs. 100, that thereafter the plaintiffs received from the debtors on the bond the sum of Rs. 500 in full discharge of the debt due by them, and that at the time of his shewing cause against the motion for reviving judgment he "was not in possession of the document by which it could now be proved" that the plaintiffs received from their debtor the sum of Rs. 500 in full settlement. The assignment to plaintiffs of the bond by the Fiscal was in the form of conveyance given in the schedule to the Fiscals Ordinance for the transfer of lands purchased at Fiscal's sales.

The bond sued upon referred to the original mortgage to 1st defendant as follows: "I do hereby mortgage the principal amount of Rs. 750 borrowed from me" by S. T. M. Ali and S. Mohideen "by mortgaging the following two allotments of land under mortgage bond No. 3,221." It then described the lands and proceeded to state that in default of payment the creditors were at liberty "to recover the same in full from this mortgage or from us."

The District Judge (H. L. Crawford) disallowed the motion to commit the 1st defendant and discharged him, holding that the plaintiffs should have adopted the course laid down in section 44 of the Fiscals Ordinance and that by their failure to discuss the property mortgaged to 1st defendant by his debtors the plaintiffs had forfeited their right to have their writ enforced. From this order the plaintiffs appealed.

The remaining facts of the case appear in the judgment of CLARENCE, J.

VanLangenberg for plaintiffs appellants. 1st defendant's acquiescence in the revival of judgment estops him from seeking to recall the writ on the ground of the judgment having been satisfied before the revival. It is submitted that what the plaintiffs purchased at the Fiscal's sale was the whole interest of the 1st defendant in the mortgage bond in favour of 1st defendant, and that the plaintiffs might thereafter make any settlement with the original mortgagors without discharging the 1st defendant from his liability to themselves. It was optional with the plaintiffs to follow the procedure laid down in section 44 of the Fiscals Ordinance.

Dornhorst (*Sampayo* with him) for 1st defendant respondent. The Fiscal purported to convey by deed the right title and interest of the 1st defendant in the bond which was the subject of the plaintiffs' mortgage. This was irregular. The Fiscal had no authority to execute such a deed, which is only legal and proper in the case of sales of immoveable property, and which, therefore, in the present instance had no legal effect. This was pointed out in the case of negotiable instruments in *Pieris v. Nicholas* 9 S. C. C. 30. The procedure laid down in section 44 of the Fiscals Ordinance should have been followed, or plaintiffs should have sued the 1st defendant's mortgagors under the power to sue contained in the sub-mortgage and credited 1st defendant with amount recovered by such action. It is submitted that plaintiffs' mortgage remains intact, and had they not compromised the claim on the original bond with 1st defendant's debtors, 1st de-

fendant could have pointed out the debt due by his debtors as property sufficient to satisfy the judgment. The writ was improperly re-issued, and 1st defendant is entitled to be discharged. As to the revival of the judgment, it is submitted that it is open to the 1st defendant on the motion to commit him to shew that the writ was invalid.

Cur. adv. vult.

The appeal came on for argument on June 27, 1890, before BURNSIDE, C. J., and CLARENCE, J.; but their lordships having differed in their opinions, counsel agreed on July 25 that DIAS, J., should take part in the decision without further argument.

On August 14, 1890, the following judgments were delivered :—

BURNSIDE, C. J.—The judgment in this matter is in my opinion right. It is certainly equitable, and I would affirm it. In my opinion the Fiscal's conveyance passed to the plaintiff no more than the mere right to sue for the debt. The debt itself, by reason of the mortgage and of the judgment, became vested in the plaintiff; and when he received the amount of the debt, he was bound to apply it in redemption of the pledge. He could not divert it from the pledge and treat it as a mere debt due to the defendant. The sale by the Fiscal did not divert the pledge: it could not, because it was sold subject to plaintiff's lien. The plaintiff by purchasing at the Fiscal's sale could acquire no larger right than any other person would have had; and it cannot be contended that, had a third person purchased the debt, it would have defeated the lien and diverted the debt from the pledge, and that the plaintiff would have lost his lien on it. It seems to me that what the plaintiff seeks to do is to have the pledge itself and give the defendant nothing for the value of it.

CLARENCE, J.—Kiduru Mohamado, the present 1st defendant, being the mortgagee upon a certain mortgage made in his favour by the mortgagors, securing a debt of Rs. 750 and interest, made a derivative or submortgage in favour of plaintiff as security for a debt due to them from himself of Rs. 750 and interest, and the sub-mortgage contained a power to plaintiffs to sue the original mortgagors and recover the original mortgage debt from them. Thereafter plaintiffs sued Kiduru Mohamado and another defendant who had bound himself to plaintiffs as surety, and obtained in September, 1883, a judgment for their own mortgage debt. Plaintiffs issued writ under this judgment; and in April, 1884, the Fiscal made a return reporting the sale of articles of moveable property for Rs. 52 and of 1st defendant's interest in the original mortgage for the price of Rs. 100. The plaintiffs were the purchasers of the latter, and they were allowed credit for their purchase money in reduction of their debt. In June following the plaintiffs obtained from the Fiscal a transfer, which, clumsily framed as it was, amounted to an assignment to them of the original mortgage.

In 1889 plaintiffs moved to revive their judgment and issue writ upon an affidavit setting out that, after deducting recoveries to the amount of Rs. 144 in all under the levy referred to, there remained still due under their judgment a sum of Rs. 1,448·50 for principal and interest.

The plaintiffs' application to revive judgment came on for discussion in December, 1889, when Kiduru Mohamado appeared and had no cause to shew against the motion to revive, and accordingly the application to revive and issue writ was allowed.

Thereafter in January last Kiduru Mohamado made an application to the Court amounting in substance to an application to have the writ recalled and satisfaction of the judgment entered up, on the ground that in fact the judgment had been satisfied in 1884. Kiduru Mohamado had already appeared upon plaintiffs' motion to revive the judgment and had made no attempt to answer plaintiffs' affidavit or shew cause against the application in any way, and he now came forward and asked to have satisfaction entered up upon the ground that the judgment had been satisfied in 1884. He gave in his affidavit but a lame and insufficient account of his allowing the application to revive to go unopposed.

The District Judge in effect upheld Kiduru Mohamado's contention, and recalled the writ; and from that order the plaintiffs appeal.

The grounds upon which Kiduru Mohamado based his application to recall the writ and have satisfaction entered up are these. He alleged in his affidavit that in 1884 plaintiffs received from the original mortgagors a sum of Rs. 500, "in full discharge of the debt due by them upon the said mortgage". This seems to have been intended as an allegation that plaintiffs in consideration of a payment of Rs. 500 gave the mortgagors a discharge in full, and it seems not to be disputed but that in point of fact such was the case. But Kiduru Mohamado nowhere says that he was unaware of this circumstance when he allowed plaintiffs' motion to revive to pass unopposed. Plaintiffs in appeal contended, and I think with reason, that Kiduru Mohamado was estopped by his acquiescence in the motion to revive.

But in truth if the merits of Kiduru Mohamado's application are considered, his application fails on the merits, and no case appears made out for entering in his favour a satisfaction of the judgment obtained by plaintiffs against him.

It has been contended that plaintiffs by compromising the original mortgage debt for a sum of Rs. 500 have in effect discharged their debtor, the original mortgagee. The short answer to that contention is that plaintiffs purchased under their writ against the original mortgagee the mortgagee's whole interest in the original mortgage and obtained from the Fiscal an assignment of the mortgage. If plaintiffs had had no such assignment as that and had merely made their recovery from the original mortgagors by virtue of the power to sue contained in their sub-mortgage, the matter would stand on a very different footing. Plaintiffs would undoubtedly have been trustees for Kiduru Mohamado of anything recovered by them from the original mortgagors, and not only so, but this act in releasing the original mortgagors on payment of a smaller sum than the debt due by them would have amounted to a release of Kiduru Mohamado. But plaintiffs having bought the original mortgage at

Fiscal's sale, it became absolutely their own property; so their claim remains against Kiduru Mohamado for the balance of his debt after deducting their own purchase money.

The District Judge appears to base his order largely upon his opinion that the plaintiffs when seeking to recover their own judgment debt due by Kiduru Mohamado ought to have adopted the procedure laid down in sec. 44 of the Fiscals Ordinance. That section indicates a procedure which "it shall be lawful to adopt where an execution debtor has a debt owing to him from a third person. Whether that section was intended to apply to the case of a sub-mortgage may be a question; but, assuming that the section does so apply and that the procedure which it contemplates might have been resorted to, the sale which the Fiscal made was still a good sale. The plaintiffs' writ issued against their debtor, Kiduru Mohamado. Kiduru Mohamado failed to point out property available and sufficient to satisfy the writ, and thereupon the plaintiffs pointed out the property hypothecated to themselves, viz., the original morgagors' mortgage. Kiduru Mohamado knew that the writ against him was unsatisfied, and it was his interest to see that property of his, seized in execution, should be realised to the best advantage. It may be—we need not discuss that question—but it may be that if Kiduru Mohamado had interfered at that point, he would have had the right to insist that the original mortgage debt should be dealt with by the procedure indicated in sec. 44. He did nothing of the kind. He remained perfectly passive, and without any opposition allowed the Fiscal to seize the original mortgage, sell it, and assigned it over to the purchasers, viz., the plaintiffs. A mortgage certainly is capable under our law of being sold and as signed so as to pass absolutely to the purchaser, and Kiduru Mohamado most certainly acquiesced in this mortgage being so dealt with. He cannot now be heard to insist to the contrary. Plaintiffs then, having become the absolute owners of the mortgage, could deal with it as they pleased. Kiduru Mohamado's debt to them remained only partially paid, and Kiduru Mohamado had no concern whatever with anything that might thereafter take place between them and the original mortgagors.

On these grounds I think that the respondent Kiduru Mohamado's application to recall the writ and have the judgment declared to be satisfied fails. Firstly, he was bound by the order to revive, which he allowed to go unopposed; and secondly, upon the merits, if the merits were open, he has shewn no grounds for having satisfaction entered up.

The order appealed from should be set aside, and respondent Kiduru Mohamado's application dismissed with costs in both Courts.

DIAS, J.—The 1st defendant in this case was the mortgagee on a mortgage bond granted to him by some third party for Rs. 750, and for the purpose of securing to plaintiff a like sum borrowed by him, the 1st defendant, from the plaintiff, he, the 1st defendant, mortgaged with the plaintiff the bond in his, the 1st defendant's, favour. The plantiff obtained a decree on his own bond and through the Fiscal seized and sold and bought the mortgage debt in favour of the 1st defendant, which the 1st defendant gave the plaintiff as security. By this purchase the plaintiff became the owner of the 1st defendant's interest in the mortgage bond so deposited with him as security, and he was at liberty to do with it what he pleased. The plaintiff appears to have received from the 1st defendant's debtor less than the full amount of the debt; but this is no answer in the 1st defendant's mouth against the plaintiff's claim on the 1st defendant for the balance still due on the 1st defendant's own bond. The plaintiff through the Fiscal realised the security which the 1st defendant gave him, and all that the 1st defendant is entitled to credit for is the amount for which the bond was knocked down to the plaintiff by the Fiscal, and nothing more. I would set aside the order with costs.

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Present:—CLARENCE, A. C. J.

(October 16 and 23, 1890.)

P. C., Kegalle, No. 8,150. } APPUHAMY v. UNDIYA and other.

Additional Police Magistrate—Transfer of case—Jurisdiction.

Where an information was laid before a Police Magistrate, and proceedings being taken up to a certain point, the case was transferred, otherwise than by order of the Supreme Court, to an Additional Police Magistrate having jurisdiction in the same district,—

Held, that such transfer of the case was illegal, and the second Magistrate had no jurisdiction to try the case.

On July 24, 1890, complaint was lodged in the Police Court of Kegalle against the defendants for theft, and the same was entertained and summons issued by Mr. N. E. Cooke, Police Magistrate of Kegalle. The defendants appeared to the summons, and were remanded by the same Magistrate. After several postponements the case was ultimately fixed for trial on September 12, 1890, on which day the following appeared recorded:—"Parties ready —for Additional Police Magistrate on the 17th at Kegalle." The Additional Police Magistrate referred to was Mr. J. C. Molamure, before whom accordingly the case came on for trial, after certain postponements, on September 30, 1890, when the defendants objected to the case being heard by Mr. Molamure, on the ground that the case having been instituted before Mr. Cooke, the Police Magistrate of Kegalle, its transfer for hearing before Mr. Molamure was illegal. The Magistrate (Mr. Molamure) overruled the objection as follows:—"The Court overrules the objection, as the case comes on for trial at the Additional Police Court before the Additional Police Magistrate, Kegalle. The case was not transferred, but the parties were noticed to appear before the Additional Police Court, Kegalle." The trial was then proceeded with, and resulted in a conviction of the defendants, who thereupon appealed.

Sampayo for defendants appellant.

Cur. adv. vult.

October 23, 1890.—The case was again mentioned, when *Layard,* S.-G., appeared for the Crown, and refer-

red to sec. 56 of Ordinance No. 11 of 1868. As to the position of the Magistrate who tried the case, he explained that Mr. Molamure was Additional Police Magistrate of Kegalle and Ratnapura, and itinerated in those districts.

The following judgment was then delivered :—

CLARENCE, A. C. J.—I think the defendants' objection to be tried by the Additional Police Magistrate should have been upheld. The information seems, in the first instance, to have been entertained by Mr. Cooke, Police Magistrate of Kegalle. Proceedings were taken up to a certain point. No trial took place in consequence of the parties not being ready; and after that the matter seems in some way, not quite ascertained, to have been sent for disposal to the Additional Police Magistrate, Mr. Molamure. When Mr. Molamure took the case up the defendants objected to being tried by him. Mr. Molamure overruled the objection, and went on with the trial. Defendants appeal against the conviction. So far as I understand, the position of the two Magistrates, from information received from the Solicitor-General, to whom I am much indebted, it would seem that this is not a case in which Mr. Molamure had joint jurisdiction over the matter pending in the Kegalle Police Court, but rather the case of a transfer from one magistrate to another; and that being so, I think Mr. Cooke should have gone on with the proceedings. I set aside the conviction, and quash all Mr. Molamure's proceedings.

———:o:———

Present:—DIAS, J.

(July 24 and August 21, 1890.)

D. C., Colombo (Special) No. 68. — In the matter of an application for registration of a trade mark.

SWAMPILLAI v. MANUELPILLAI.

and

D. C., Colombo (Special) No. 70. — In the matter of an application for registration of a trade mark.

MANUELPILLAI v. SWAMPILLAI.

Trade mark—"Proprietor"—User—Priority of application—Registration—Trade Marks Ordinance, 1888.

The user of a mark as a trade mark confers the right of property in it when the article it represents has acquired a general reputation by that mark in the market, and the proprietor of such trade mark is entitled to have it registered under the Trade Marks Ordinance, 1888.

The Trade Marks Ordinance (No. 14 of 1888), which came into operation on March 25, 1889, by sub-sec. 1 sec. 3 provided: "Any person claiming to be the proprietor of a trade mark may by himself, or his agent, apply to the Colonial Secretary for an order for the registration thereof." Tobacco, manufactured and unmanufactured, forms class 45 in the classification given in schedule 3 to the Rules promulgated by the Governor on March 28, 1889, under the provisions of the Ordinance, and published in the *Government Gazette* of March 29, 1889.

Swampillai and Manuelpillai were traders in Jaffna cigars, carrying on business in Jaffna and Colombo. On April 11, 1889, Swampillai forwarded to the Colonial Secretary, under the provisions of the said Ordinance, a representation of an oblong box (commonly used for collecting alms) with a slit on the lid, and the inscription "Charity Box" in English, Tamil, and Sinhalese, the device being surrounded by his name and initials, and applied for registration of the same as a trade mark for goods in class 45, tobacco manufactured and unmanufactured. This application being duly advertised, Manuelpillai on May 31, 1889, gave notice of opposition under sec. 10 of the Ordinance on the grounds: (1) that he, and not Swampillai, was entitled to register the said trade mark under the provisions of the Ordinance; (2) that the said mark was substantially identical with a mark (a representation of which he gave) which he had used ever since the year 1860 for the goods in question; and (3) that his goods had acquired a position in the trade under the said mark. A copy of this opposition having been forwarded to Swampillai by the Colonial Secretary, Swampillai on June 12 made a counter statement to the effect: (1) that prior to March 15, 1889, no other person in Ceylon used as a trade mark, for any description of goods, the mark of which he claimed to be owner; (2) that on March 15, 1889, he commenced to use the trade mark for cigars and cheroots manufactured and sold by him; (3) that he denied that since the year 1860 Manuelpillai used the mark described in his notice of opposition, or that he was sole proprietor of the same; and (4) that he denied that Manuelpillai ever used any such mark prior to May 21, 1889, or that he acquired a position in the trade under the said mark. Manuelpillai then having furnished the necessary security for costs as required by sub-sec. 10 of sec. 3 of the Trade Marks Ordinance, the Colonial Secretary required Swampillai in terms of sec. 11 to apply to the District Court and obtain an order that notwithstanding the opposition of Manuelpillai the registration of the said trade mark should be proceeded with by the Colonial Secretary. Accordingly Swampillai commenced the proceeding No. 68 in the District Court of Colombo by an application to which he made Manuelpillai respondent.

Beyond opposing Swampillai's application to the Colonial Secretary, Manuelpillai also on May 31, 1889, made a separate application on his own behalf to the Colonial Secretary for registration of the trade mark. Swampillai opposed this application, and after proceedings similar to those set forth above Manuelpillai commenced the proceedings No. 70 in the District Court of Colombo, making Swampillai respondent to the application.

The respective applications and answers developed substantially the same issues as above noted. The cases having come on for investigation, were by order of Court consolidated, and were heard and decided together.

The following is the judgment of the learned District Judge (C. L. Ferdinands):—

"These are two applications before the Court under the Trade Marks Ordinance, 1888, for the registra-

tion of a trade mark called "Charity Box". It consists of a wooden box with a slit on the lid to receive charitable contributions in money, and the words "Charity Box" are written on a side in English, Tamil, and Sinhalese characters. The first application was made by one Manuelpillai Bastianpillai Swampillai, the applicant in case No. 68, whom, for the sake of brevity, I shall hereafter call the 1st applicant. The second application was made by Savari Muttu Manuelpillai, the applicant in case No. 70, whom I shall call the 2nd applicant. Both applicants are dealers in Jaffna cigars. The cases were consolidated by an order of this Court made on the 10th day of December last, and the issue to be tried in each case was settled as one of user by each party of the trade mark he applies to be registered. It is in evidence, and I find it as a fact, that the 2nd applicant was the first cigar trader who kept a "Charity Box" in his boutique for the collection of alms. He was followed by the 1st applicant and several others in this practice, but the appellation "Charity Box cigars" was confined to the 2nd applicant's cigars, which thereby acquired a distinctive value and reputation in the cigar market. But the keeping of a box for the receipt of alms will not entitle either party to call it his trade mark for the purpose of registration, unless it was accompanied by user of the device on his cigar boxes in the course of trade. It is admitted by the 1st applicant that he first began to brand his boxes with the device he claims to be registered one or two months after March, 1889; and it was only on the 11th April that he applied to the Colonial Secretary for an order for its registration. It is clear, therefore, that he had no user, and consequently no right of property in the trade mark at the date of his application. The 2nd applicant has adduced abundant evidence, which I see no reason to disbelieve, of the user of this device on his trade boxes for the last 18 years; and if the user conferred a right of property, he, and not the 1st applicant, is entitled to have the trade mark registered.

"It was contended by the 1st applicant's counsel, that a trade mark in use before the Trade Marks Ordinance (14 of 1888) confers no proprietory right, and that the 1st applicant by right of priority of application is entitled to preference in registration. The Ordinance is but a transcript of the English statute 46 and 47 Vict. Cap. 57 Part 4. The definition of a "trade mark" in our Ordinance is precisely the same as in the English Act, with the omission, however, in our Ordinance of a provision in the Act, that a trade mark in use before the operation of the Act may be registered under it. This provision was necessary in England, as trade marks were protected by previous enactments, 38 and 39 Vict. Cap. 91 with two amending Acts of 1876 and 1877, all which were repealed by the last Act of 1883.

"There was no similar necessity for the provision being inserted in our Ordinance. I take it that the general user of a trade mark for a length of time confers the right of property when the article it represented had thereby become a vendible article and acquired general notoriety and reputation in the market. (This has been proved to be the case with the cigars of the 2nd applicant indicated as the "Charity Box cigars".) See *M'Andrew* v. *Basset*, 33 L. J. (N. S.) Ch. 561. In the case of *Leather Cloth Co.* v. *American Leather Co.* 9 H. L. 538, Lord Kingsdown puts the case thus: "that a man marks his own manufacture either by his name or any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes by use to be recognised in trade as the mark of the goods of a particular person, no other trade has a right to stamp it upon his goods of a similar description. This is what I apprehend is usually meant by a trade mark. Just as the broad arrow has been adopted to mark Government stores, a mark having no meaning in itself, but adopted by and appropriated to the Government.

"I hold that at the date when the Trade Marks Ordinance came into operation the 2nd applicant had by general user acquired the right of property in the Charity Box device, and the 1st applicant had not the right to appropriate it by prior application or otherwise."

Thereupon the District Judge dismissed Swampillai's application and made order that the Colonial Secretary do proceed with the registration of the trade mark applied for by Manuelpillai.

From this judgment Swampillai appealed.

Browne (*Morgan* with him) for appellant. The question under the Trade Marks Ordinance, 1888, is, whether appellant is "proprietor" of the trade mark. How will such proprietorship be acquired? The Ordinance does not define "property" or "proprietor". It is submitted that user does not confer the right of property. The case here is in a similar position to the cases in England before statute, when Chancery interfered. The true ground of such interference was not to protect rights of property, but to prevent fraud on purchasers. (*Millington* v. *Fox*, 3 Myl. & Crg. 338; *Perry* v. *Truefitt*, 6 Beav. 66.) The right to protection of the Court of Chancery did not depend on any exclusive right to a particular name, but on the right to be protected against fraud. (*Croft* v. *Day*, 7 Beav. 84; *Morison* v. *Moat*, 9 Hare 241.) Even in *M'Andrew* v. *Bassett* and the *Leather Cloth Company case* referred to by the District Judge, property in a mark was said to exist only in a qualified sense, very different, for instance, from the sense in which copyright exists. In *Singer Machine Manufacturers* v. *Wilson*, L. R. 3 App. 396 and 400, Lord Blackburn was "not prepared to assent either to the proposition that there is a right of property in a name or that it is not necessary to prove fraud". So English cases do not establish conclusively that user gave a right of property. It is submitted therefore that such right will be acquired by first invention and first application for registration, which appellant undoubtedly did. Even if user confers a right of property, in order to deprive appellant of the right to register, it should be established that such user on the part of respondent existed prior to that of appellant. Referring to the evidence, counsel argued that the respondent failed on that point, and also that the trade mark claimed by appellant differed materially from that claimed by respondent.

Dornhorst (*J. Grenier* and *Wendt* with him) for respondent. The issue settled by the District Judge, viz., as to user, is the only issue developed by the pleadings. The appellant does not claim to be "proprietor" on the ground of having invented or devised the mark, but only of having begun to use it from March 15, 1889. The respondent based his right on both grounds: (1) of having invented and devised the mark, and (2) of having used it for the last 18 years. The parties acquiesced in the order of December 10, 1889, settling the issue as one of user, and the District Judge tried that issue. It is not therefore open to the appellant to go behind that order and seek to establish "proprietorship" on grounds other than that of user. The English Act, 46 and 47 Vict. Cap. 57 Pt. 4, especially recognises the rights of proprietorship acquired by user. [See proviso 3 of section 64.] On the question of fact the District Judge has found that the respondent has used the mark for a series of years. The cases cited by the other side might apply if the appellant had put his case on the footing that the mark was common to the trade, because then it might be argued that the respondent could not claim property in a common mark. Counsel cited *Leather Cloth Co.* v. *American Leather Cloth Co.*, 9. H. L. 523; *M'Andrew* v. *Bassett*, 33 L. J. (N.S.) Ch 561; *Leonard* v. *Wells*, 50 L. T. (N.S.) 23; L. R. 26 Ch. D. 288; *Hyde & Co.'s Trade Mark*, 38 L. T. (N.S.) 777; L. R. 7 Ch. D. 724.

Cur. adv. vult.

On August 21, 1890, the following judgment was delivered:—

Dias, J.—This is a proceeding under the Registration of Trade Marks Ordinance No. 14 of 1888. The trade mark in dispute between the parties is a brand or a label with the figure of a charity box in the centre. The first applicant, who is the appellant, made application to the Colonial Secretary to register the above mark, when the second applicant appeared and opposed the application, and these proceedings were instituted by the parties as directed by the Ordinance above referred to.

The parties are sellers of cigars, and each claims a right to the paricular brand. The facts proved and found by the District Judge are these: that the second applicant was in the habit of using this mark for more than 18 years, and that this opponent only began to use it in the beginning of 1889. This finding is fully borne out by the evidence adduced, and I see no reason to interfere with the conclusion of fact arrived at by the District Judge. So I shall confine myself to a consideration of the legal aspect of the case.

It was contended for the appellant that before the Ordinance of 1888 came into operation no exclusive right to any particular trade mark as representing a certain class of goods, as in this case cigars, was recognized by law. This is a very broad proposition, and requires some strong authority to support it. It amounts to this, that there was no right of property in a trade mark before the Orrdinance of 1888 came into operation. To see the utter fallacy of this contention we have only to consider the meaning and effect of what is called a trade mark. A sells cigars for a number of years under a particular brand or mark. Under that brand the cigars acquire a name and reputation in the market. B appropriates the brand and sells his own cigars under it. This simply is a fraudulent misappropriation of the name and reputation of A's cigars as represented by his trade mark and selling his (B's) own cigars under a false name. That the right of property in a trade mark existed before the Ordinance of 1888 is shewn by the Ordinance itself. According to section 3, the applicant for a registration is supposed to be a person claiming to be proprietor of a trade mark, and section 20 contemplates trade marks which were in existence before the Ordinance.

This evidently was the view which the District Judge took when he made the order of 10th December, 1889, settling the issues to be tried. In pursuance of this order evidence was gone into on both sides on the question of user by the parties of the trade mark, with the result that the user of the mark by the second applicant has been established to the satisfaction of the District Judge.

I do not think it necessary to refer to the several cases cited by the District Judge, as I think we have enough in the Ordinance itself to shew the existence of the common law right before the Ordinance was passed. I affirm the judgment of the District Court with costs.

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Present:—Clarence, J.

(January 17, 1890.)

P. C. Colombo, (Additional) No. $\frac{30\ 7}{1167}$. } Smith v. Ahamado.

Criminal trespass—remaining on board a steamer when ordered to leave—defective charge—Ceylon Penal Code, section 427.

A charge agaist a defendant, that he did at the Colombo harbour on board a steamer "commit criminal trespass by unlawfully remaining there when ordered to leave the ship by the chief officer of the said ship"—

Held to disclose no offence.

The respondent was a money changer and vendor of jewellery, and used to go on board the steamers in the Colombo harbour for the purpose of such business.

The evidence disclosed that on December 3, 1889, the defendant and other persons doing similar business went on board the s.s. "Orient", then in the harbour, and a passenger having complained that he had been cheated by a trader (not the defendant), the Chief Officer ordered the vessel to be cleared of all the traders. The complainant, who was a sergeant of the Harbour Police, proceeded to carry out this order, and all the traders left the vessel with the exception of the defendant, who evaded the order, alleging that he had to get some money from a passenger, and at last, on leaving the vessel, abused the complainant.

Camplaint was then made to the Additional Police Magistrate at the Customs, who, after evidence, framed a charge for criminal trespass as above under sections 427 and 433 of the Ceylon Penal Code. Upon being convicted on this charge the defendant appealed.

Dornhorst for defendant appellant. The charge does not disclose an offence. To constitute criminal trespass there must be proof of intention to commit an offence, or intimidate, insult, or annoy any person, which is entirely wanting here.

Clarence, J.—The charge framed by the magistrate is a bad charge. It does not aver any act amounting to a criminal trespass. It only avers that the defendant unlawfully remained on board the steamer when ordered to leave, and that is not necessarily criminal trespass. My order simply is—that I quash the charge framed and, of course, the conviction under it.

———:o:———

Present:—Clarence and Dias, JJ.

(*December* 16 *and* 20, 1889.)

D. C. Kandy, No. 2171. } Seyadu Ismail v. Mohamadoe Assen.

Malicious prosecution—action for damages—"discharge"—determination of the prosecution.

The discharge of a defendant in a criminal case by the magistrate under section 168 of the Criminal Procedure Code is a sufficient determination of the prosecution for the maintenance of a civil action for damages for malicious prosecution.

The libel in this case averred that the defendant maliciously and without reasonable and probable cause charged the plaintiff in the Police Court of Matale with criminal breach of trust, and that "the said charge was inquired into by the Police Magistrate on the 16th April, 1889, and after evidence the plaintiff was acquitted, whereby the said prosecution was determined".

The answer, *inter alia*, denied "that the prosecution against the plaintiff has been determined or that the plaintiff was acquitted of the said charge".

In evidence it appeared that the Police Magistrate, after examining the complainant in the Police Court case (the present defendant), held that the evidence disclosed no offence, and discharged the defendant (the present plaintiff) under section 168 of the Criminal Procedure Code.

The acting District Judge (O. W. C. Morgan) held on the facts that there was no reasonable and probable cause for the said charge, but was of opinion that the prosecution had not determined, stating his reasons as follows:—"The charge was not triable summarily by a police court, and the inquiry in P. C. Matale 4297 was under chap. XVI. of the Procedure Code, with the view of trying the plaintiff, if there were sufficient grounds for a committal, before a superior court. The magistrate under section 168 of the Procedure Code discharged the accused as the facts did not disclose a criminal offence. A discharge under that section is not an acquittal, and the Attorney-General may yet under section 254 of the Procedure Code take steps to have the accused treid before a superior court. If a charge had been framed by the magistrate and the proceedings forwarded to the Attorney-General under section 175 of the Procedure Code, a discharge directed by the Attorney-General under section 242 of the Procedure Code would operate as a determination of the prosecution; but, as the proceedings now stand, the accused may yet at any time be put on his trial and his discharge under section 168 of the Procedure Code would not avail him as a plea of *autre fois acquit.*"

The learned Judge thereupon dismissed the plaintiff's case, and the plaintiff appealed.

Wendt for plaintiff appellant.
Dornhorst for defendant respondent.

Cur. adv. vult.

On December 20, 1889, the following judgments were delivered:—

Clarence, J.—There is no reason whatever to disapprove of the District Judge's finding that there was no reasonable or probable cause for the criminal prosecution which defendant instituted against plaintiff. The learned District Judge, however, was quite wrong in holding that that prosecution had not been terminated so as to enable the plaintiff to sue the defendant for damages.

The judgment must be set aside and judgment entered for the plaintiff with costs in both courts, and the case must go back to the District Court in order that the District Judge may assess the damages.

Dias, J.—The District Judge has taken an erroneous view of the effect of the order of the Police Magistrate discharging the accused in the criminal case. He thought that the accused was still liable to be prosecuted as the order of discharge did not terminate prosecution. As between the accused

and the complainant the order of discharge is a final act which put an end to the proceedings. No doubt the accused is liable to be put on his trial again, but that would be a new proceeding. If the reasoning of the District Judge is good, a person in the position of the plaintiff will be remedyless, as he is liable to be proceeded against at any future time at the discretion of the prosecutor. I think the judgment must be set aside, and the case sent back to the District Judge to assess the damages. Plaintiff must get all costs in both courts.

———:o:———

Present:—Dias, J.

(*November* 14 *and* 21, 1890.)

P. C. Colombo, No. 12685. } Savariel v. Bastian Appu and others.

Police Court—discharge of the defendant—fresh inquiry at the direction of the Attorney-General—Criminal Procedure Code, sections 152 and 254—plea of autre fois acquit—*jurisdiction—practice.*

The Criminal Procedure Code, chap. xvi. section 152, *inter alia,* enacts that a police court shall proceed to try an offender or to inquire into the matter of an alleged offence and commit for trial or otherwise dispose of any accused person "whenever it appears to the Attorney-General that an offence has been committed and he shall by his warrant under his hand require the magistrate to inquire into the same".

Section 254 enacts:—"Whenever a police court shall have discharged an accused person under the provisions of chap. xvi. and the Attorney-General shall be of opinion that such accused person should not have been discharged, the Attorney-General may file an information against such person either in the Supreme or a district court", &c.

In a previous criminal proceeding in the Additional Police Court of Colombo, upon a complaint against the defendants for an offence not summarily triable, the Police Magistrate, after investigation, disbelieved the evidence and discharged the defendants. Subsequently the Attorney-General, acting under chap. xvi., section 152, of the Criminal Procedure Code, required the Police Magistrate of Colombo to inquire into the same alleged offence.

Held that section 254 of the Criminal Procedure Code was not imperative, but that the Attorney-General may proceed under that section or under section 152, and that the Attorney-General having issued the warrant under section 152 the Police Magistrate had jurisdiction to inquire into the same offence notwithstanding the previous discharge of the defendants.

At the commencement of these proceedings the defendants took exception to the jurisdiction of the Police Magistrate, on the ground that the previous discharge was a bar to this prosecution. The Police Magistrate overruled the objection, and the defendants appealed.

Dornhorst for defendants appellant. The Attorney-General could not act under chap. xvi., section 152. That chapter is headed "Of Commencement of Proceedings before Police Courts—Institution of the Inquiry," and clearly refers to proceedings initiated for the first time. [*Dias, J.*—But a discharge is no bar to a second prosecution, and these are fresh proceedings.] True, but the offence has already been disposed of in the previous case, and the magistrate in this case exercised jurisdiction solely under the warrant under section 152, which it is submitted the Attorney-General had no power to issue. The Procedure Code itself (section 254) points out the course that should be adopted by the Attorney-General in a matter like this, viz., procedure by way of criminal information. It is submitted that the Attorney-General should have proceeded under section 254, or have appealed from the order of discharge in the previous case.

Layard, S.-G., for the Crown. The provisions of section 254 are not compulsory. It is open to the Attorney-General to proceed under section 152. The first prosecution had determined by the discharge of the defendants, and this was "the commencement of proceedings" in a new case and therefore chap. xvi. applied. It is submitted that the Police Magistrate had jurisdiction to inquire into the charge afresh in these proceedings.

Cur. adv. vult.

On November 21, 1890, the following judgment was delivered :—

Dias, J.—The question for decision in this case is whether, under the circumstances, the Attorney-General can direct an inquiry under section 152 of the Procedure Code.

The accused, ten in number, were tried in a previous case P. C. 1424 and discharged in these words: "The accused are all discharged." After this the Attorney-General, by his order of 8th August, 1890, authorised and directed the Police Magistrate to inquire into the same offence. Accordingly these proceedings were instituted, and on the day of trial the accused objected to the jurisdiction of the court, and the Police Magistrate overruled this objection. Hence this appeal. It was contended for the appellant that section 152 only applied to cases which have not been previously dealt with by the Police Court, and this charge having been already investigated and disposed of in a previous proceeding, the only course open to the Attorney-General was that pointed out by section 254. I see no reason why section 152 should have such a limited operation. The words of subsection 5 to section 252 are "whenever it appears", etc., that is, when at any time it appears to the Attorney-General. The time is not limited within which the Attorney-General is empowered to act. All that is necessary is that an offence has been

committed and the offender has not been dealt with according to law. A mere discharge of the accused does not amount to a verdict of not guilty, and the accused stands in no better or worse position than any accused person who has not been dealt with by a competent court.

The proceedings taken against the accused by the direction of the Attorney-General are altogether new, and have no reference whatever to any previous proceedings. With regard to the argument drawn from section 254, all that need be said is that it is open to the Attorney-General to present an information against any person who has been discharged by the Police Court. The provision is not imperative, and the Attorney-General is not bound to take the course pointed out by that section. On the whole, I think the order appealed from is right, and it should be affirmed.

———: o :———

Present:—Clarence, J.

(June 26 *and July* 3 *and* 10, 1890.*)*

D. C. Kandy, (Insolvency) No. 1292. — In the matter of the insolvency of Pitche Muttu Kangany.

Insolvency—lying in prison for 21 *days—imprisonment for debt—committal upon warrant in mesne process—act of insolvency—Ordinance No.* 7 *of* 1853, *section* 9.

K, being a defendant in a certain suit, was arrested under warrant in mesne process, and was, on February 4, 1890, committed to prison for default of giving security under Ordinance No. 15 of 1856. On February 28, 1890, K., being still in prison, petitioned for the sequestration of his estate, and prayed that he be adjudicated insolvent.

Held that this was not a commitment for debt or non-payment of money or a detention for debt within the meaning of section 9 of the Insolvency Ordinance, and that consequently K's lying in prison for 21 days under the above commitment was not such an act of insolvency as entitled him to be adjudicated insolvent.

Pitche Muttu Kangany, the respondent, was defendant in case No. 3,092 of the District Court of Kandy, in which Abdul Rahaman Saibo, the appellant, was plaintiff. The respondent was arrested under warrant of arrest in mesne process issued in that case at the instance of the appellant, and having been unable to find security as required by Ordinance No. 15 of 1856 was committed to prison "until he give good and sufficient security in the sum of Rs. 500 to stand and abide the judgment of the Court in the premises and to pay all such sum or sums of money as shall be decreed or surrender himself or be charged in execution". Judgment in the said case was obtained by Abdul Rahaman Saibo for Rs. 420 with interest and costs on February 12, 1890.

The defendant remained in jail under the above commitment until February 28, 1890, when he presented to the Court a petition under the Insolvency Ordinance and prayed that he be adjudged an insolvent, the act of insolvency relied on being his lying in prison from February 4 to February 28.

When this application was presented, it was opposed by Abdul Rahaman Saibo, on the ground that the respondent had not committed an act of insolvency within the meaning of the Ordinance. But the District Judge (Lawrie) overruled the objection and adjudged the respondent insolvent and placed his estate under sequestration, and further ordered the respondent to be discharged from custody. From this order Abdul Rahaman Saibo appealed.

Section 9 of Ordinance No. 7 of 1853 enacts: "If any person having been arrested or committed to prison for debt or on any attachment for non-payment of money shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for 21 days, or having been arrested or committed to prison for any other cause shall lie in prison for 21 days after any writ of execution issued against him and not discharged, every such perison shall thereby be deemed to have committed an act of insolvency".

Dornhorst for appellant.

Browne for respondent.

Clarence, J.—The question is,—has respondent committed an act of insolvency by suffering 21 days' imprisonment within the meaning of section 9 of the Insolvency Ordinance? I think that he has not. He was imprisoned on mesne process because he failed to give security "to abide by the judgment of the Court" in a certain action and "pay all such sum or sums of money as should be decreed", and so on. That was not a commitment for debt or non-payment of money or a detention for debt within the meaning of the Insolvency Ordinance. It was then argued that his case may fall within another part of section 9 which declares that a person "having been arrested and committed to prison for any other cause" and lying in prison 21 days after writ of execution issued against him and not discharged shall be deemed to have committed an act of insolvency. As to this, it is sufficient, without going further, to say that the requisite number of days had not elapsed. Admittedly 21 days had not elapsed when he filed his petition. The adjudication is set aside, and the opposing creditor will have his costs in both Courts.

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Present:—CLARENCE, A. C. J.

(*October* 30 *and November* 21, 1890.)

P. C. Kalutara, No. 9932. } HENDRICK APPUHAMY v. JAMES and others.

Criminal Procedure—compensation—non-summary case—jurisdiction—Criminal Procedure Code, section 236.

In the case of a charge for housebreaking and theft under section 443 of the Penal Code, the complainant mentioned in his complaint an assault by the defendant as an incident of the occurrence. The Police Magistrate on dismissing the case ordered complainant to pay compensation to the defendants in respect of the complaint as to the assault.

Held, following *Jayatilleka* v. *Davit Appu*, 8 S. C. C. 196, that a police magistrate cannot award compensation to the defendant in a case not summarily triable.

Held also that in a non-summary case the police magistrate cannot separate from the general complaint an incident of the alleged offence as a charge summarily triable and then make it the subject of an order for compensation.

The information by the complainant was to the effect that the defendant broke and entered into his boutique and "after tying up the person who was then sleeping in the boutique did steal and carry away" certain property. The Police Magistrate having investigated the complaint framed a charge for housebreaking and theft under section 443 of the Penal Code, and subsequently upon instructions from Crown Counsel he dismissed the case and proceeded to fine the complainant as follows:—"The complainant is fined Rs. 5 Crown costs, and Rs. 10 compensation to each accused for bringing a false charge of assault, of which the accused are acquitted." From this order the complainant appealed.

Peiris for complainant appellant.

The following judgment was delivered on November 21, 1890:—

CLARENCE, A. C. J.—Complainant charged defendants with housebreaking and theft and mentioned incidentally in his information that the defendants tied up a person who was sleeping on the permises said to have been broken into. The Magistrate after investigating the complaint discharged the defendants, and that order is not appealed from, but the Magistrate also ordered the complaiannt to pay Rs. 5 Crown costs and to pay compensation to each defendant for a false charge of assault, and complainant seeks to appeal against those two orders.

The order for Crown costs is not appealable. With regard to the order for compensation, compensation according to the decision reported in 8 S. C. R. 196 can be awarded only in cases summarily triable. Here the complainant's complaint was of an offence not summarily triable, viz., housebreaking. In my opinion it was not right for the Magistrate to separate from the general complaint the alleged incident of the tying, an incident of the alleged housebreaking and theft, as a charge of assault summarily triable, and thus make it the subject of an order for compensation. The principal to be observed is that where the complaint is of a matter not summarily triable, the Magistrate cannot order compensation, though the defendant party of course may have his remedy by action.

Order for compensation set aside.

—:o:—

Present:—BURNSIDE, C. J.

(*May* 26, *and June* 23, 1890.)

The Municipal Magistrate's Court, Kandy, No. 1912. } GOONETILLEKE v. PHILIP.

Ruinous house—"owner"—Ordinance No. 15 *of* 1862, *section* 1, *subsection* 5.

Subsection 5 of section 1 of Ordinance No. 15 of 1862 enacts "that "whosoever, being the owner of a house, building, or wall, shall allow the same to be in a ruinous state," &c., shall be liable to a fine.

Upon a conviction under the above enactment of a person who was agent of the owner of a house.—

Held that the actual owner and not an agent or representative of the owner of a house or building is liable under the above enactment.

The defendant, who by himself or his clerk collected the rent of a house belonging to a third party and acted as agent of the owner, was charged under section 1 subsection 5 of the Ordinance No. 15 of 1862 with having allowed the premises to be in a state dangerous to the inhabitants thereof. Upon a conviction by the Magistrate, the defendant appealed.

Dornhorst for defendant appellant.

On June 23, 1890, the defendant was acquitted, the Supreme Court expressing its opinion as follows:—

BURNSIDE, C. J.—The Ordinance 15 of 1862 refers to the owner of a house without any qualification. A person who is not owner is not liable to the penalities imposed by section 1 of Ordinance 15 of 1862, notwithstanding that he may be the attorney or agent or representative of the owner or otherwise stand in his place or represent him.

Present:—Clarence, A. C. J.

(*October* 16 *and* 23, 1890.)

P. C. Haldumulla, No. 3,335. } Dumphy v. O'Brien.

Master and servant—rice advance to coolies—right of employer—engagement for particular work—Ordinance No. 11 *of* 1865 *section* 19.

An employer of coolies bound by ordinary contract of monthly service is under no legal obligation to make rice advances, and the coolies are not entitled to leave service merely because such advances are not made.

When coolies are engaged for a particular work, the service within the meaning of the penal clauses of the Labour Ordinance ceases when that work is over or given up; and the employer cannot seek to prevent them from leaving until any money due to him for advances be paid, or to pass them on to some other employer who would pay him their debts.

The defendant was charged with wilfully and knowingly retaining in his service coolies bound under a contract to serve the complainant after receiving notice in writing that such servants were so bound, in breach of section 19 of the Ordinance No 11 of 1865. Upon an acquittal of the defendant by the Police Magistrate, the Attorney-General appealed.

The facts of the case sufficiently appear in the judgment of the Supreme Court.

Dornhorst for the Attorney-General appellant.

J. Grenier (*Sampayo* with him) for defendant respondent.

Cur. adv. vult.

On October 23, 1890, the following judgment was delivered :—

Clarence, A. C. J.—Mr. Dumphy, a late contractor on the Haputale Railway Extension, charged Mr. O'Brien, another contractor, under section 19 of the Labour Ordinance of 1865, with knowingly, after written notice, retaining in his service about 70 coolies bound to complainant as monthly labourers. The Magistrate framed a charge, and after recording defendant's statement acquitted defendant; and the Attorney-General, with the view, perhaps, of enabling complainant to obtain from this Court a decision on the legal question involved, has signed an appeal petition. Defendant is charged with harbouring these coolies in July. It is not denied that he did take them over and kept them in spite of Mr. Dumphy's complaints. It appears from the evidence that Mr. Dumphy threw up his contract work in June, and thenceforward he had no work to give the coolies. Some of the coolies and kanganies were called as witnesses; and there is considerable conflict between them and the camplainant as to the circumstances in which they found themselves when complainant stopped work. Complainant's case seems to be that the coolies were in his debt, and that he wanted to keep them till he could transfer them to some other master or masters who would pay their debts to him. The coolies and kanganies, on the other hand, represent themselves as without rice as well as work. Some complained that they were starving, and defendant was told that the coolies could get neither work nor rice and wished to come to him. They did come to him, and he kept them in spite of complainant's remonstrances. Further, defendant is charged under section 19 of the Ordinance, and, if convicted, may be fined and imprisoned.

It is quite clear from the evidence that the coolies were eager to go away from complainant and take service with some one who would give them work and rice. I connot say that, in law, these coolies, bound by ordinary contract of monthly service, would be entitled to leave it merely because they could get no rice advance. It is almost, if not quite, an unadvisable custom to give coolies rice advances for their weekly food ; and though the coolies would, in most cases, be unable to live without this rice supply, the employer is under no legal obligation to made it. The only conclusion at which I can arrive on this evidence is that these coolies were not getting enough rice to live upon or anything like it, and were alarmed at the prospect before them in consequence of complainant having thrown up his work. Complainant seems to think that he would have a right to pass them on to some other employer who would pay what he considered them to owe him. Complainant certainly could have no such right as that ; but he also contends that the coolies were still in his service and were not entitled to leave him as long as their contract of service subsisted. It appears that a month's notice to quit service had been given complainant by the coolies or some of them, but the month had not expired when the coolies went over to defendant.

The case put by complainant is, although he had no work for these coolies, they were still in his service. It is certainly easy to conceive cases in which the contract of service as between coolies and employer may remain on foot although the employer may have no work for the cooly to do. The employer may still be bound to pay wages, and the coolies may be bound to remain. The position assumed by complainant is, however, a peculiar one. His case seems to be, that he engaged these coolies to work for him on the railway works. He admits that so for as he is concerned there is no more railway work, but he claims that the coolies are still in his service within the meaning of the penal clauses of the Labour Ordinance. The question simply is, what *was* the contract entered into between these coolies and complainant? Because, if it was only a contract work for him while he had railway

work the coolies would be free [to go when that work stopped. The burden of proving what the contract of service was lies on complainant.

Neither in complainant's original charge nor in that framed by the Police Magistrate are any particular coolies named or specified as the subject matter of the imputed offence. Complainant in his own written charge describes them as "about 70 of my coolies".

All that complainant shows amounts to no more than this, that he had bodies of coolies working for him under the kanganies named Francis and Harmanis. "All these coolies," said complainant, "were at the time bound to me under a verbal contract of hire and service." He added: "I had made the contract with their kanganies, Francis and Harmanis. I had also made advances on their (the coolies) behalf to Francis and Harmanis." Some of the coolies, complainant says, were indebted to him, while he was himself indebted to others. This is all the evidence there is about the contract under which these coolies were engaged. Certainly there is no proof here that coolies were bound to adhere to complainant after he threw up his railway work. As to proof of any actual verbal agreement between complainant and the coolies, there is none. Complainant admits that he made his verbal agreement with their kanganies only, and does not tell us what its terms were. It was not contended in argument that the Indian Coolies Ordinance, 1889, extends to these coolies who, so far as we can judge from their names, which appear in the evidence, seem to be *Sinhalese* people; but if it does so apply, it carries complainant's case no further. That Ordinance says that "every labourer who shall enter into a verbal contract, &c., or whose names shall be entered in the check-roll of an estate and who shall have received an advance of rice or money from the employer" is, in the absence of express stipulation, to be deemed to have entered into a contract for a month renewable from month to month. Doubtless these coolies while in complainant's employe had received rice, but no check-roll has been produced in evidence; any check-roll there may have been under the circumstances could hardly be the "check-roll of an estate" within the meaning of the Ordinance.

This appeal, therefore, entirely fails for want of proof that the unnamed and unspecified coolies, who form the subject matter of the charge, were bound to complainant by any contract of service which renders defendant obnoxious to section 19 of the Ordinance of 1865, for having taken over and retained the coolies after the complainant threw up his railway work.

In face of the circumstances disclosed in the evidence, I cannot say that I regret the conclusion that defendant is not to be punished for giving work to these coolies.

Upon the conflict of testimony between complainant and some of the witnesses, as to complainant's having or not having given permission to the coolies to go away after he stopped work, I express no opinion. Neither have I looked at the letter Z referred to in the evidence, and said to be filed in the paper-book, because there is no note of its being tendered in evidence to the Magistrate.

———:o:———

Present:—Lawrie, J.

(*February* 23 *and March* 1, 1888.)

D. C. Galle, (Insolvency) No. 212. } In the matter of the insolvency of Punchihewage Don Juanis.

Insolvency—right of insolvent to protection—last examination—Ordinance No. 7 *of* 1853, *section* 36.

After a person is adjudicated insolvent, he is entitled to protection as of right until the time allowed for finishing his examination.

The appellant having been adjudicated insolvent on the petition of a creditor, certain proceedings took place and the petitioning creditor was appointed assignee. The second sitting was held and adjourned to January 24, 1888, when the District Judge (*G. W. Paterson*) again adjourned the second sitting and recorded the following:—"The assignee is not present and has done nothing. He is also the petitioning creditor. Insolvent admits that petitioning creditor is his aunt's son. I believe this is a case of collusion between him and insolvent, and under these circumstances insolvent is no longer to be protected from arrest, unless he petitions in his own name." From this the insolvent appealed.

There was no appearance of counsel.

On March 1, 1888, the following judgment was delivered:—

Lawrie, J.—I am of opinion that the District Judge was wrong in announcing that the insolvent was no longer protected from arrest. The 36th section of the Ordinance enacts, that if an insolvent be not in prison or custody at the date of adjudication, he shall be free from arrest or imprisonment by any creditor for such time as shall be allowed him for finishing his examination. This seems to me to be a positive enactment of a privilege which it is not within the power of a District Court to take away.

The 37th section contemplates the issue of a protection to an insolvent, and it has always been the practice to give an insolvent protection. The predecessor of the present learned District Judge gave that protection on the 24th October; it is still in force. The

mere announcement that the insolvent is not protected seems to me unavailing and to be *ultra vires* of the District Judge. I read the Ordinance as giving an unconditional privilege and freedom from arrest, until the examination is finished, to all who were not in custody at the time they were adjudicated insolvent.

Set aside.

———:o:———

Present:—Dias, A. C. J., and Lawrie, J.

(*February* 10 *and* 21, 1888.)

P. C. Kegalle, No. 5946. } Wattegame Ratemahatmeya v. Pedro Perera and others.

Costs awarded to several parties—payment to one—joint judgment—practice.

Where an order for costs is made in favour of several parties, payment to or settlement with one of them constitutes a discharge as against all.

So *held* by Dias, A. C. J.

An injunction was issued *ex parte* at the commencement of this suit before summons. Afterwards a proctor filed a proxy on behalf of all the defendants, especially authorising him on behalf of the first defendant to apply for a dissolution of the injunction and on behalf of all the defendants to file answer Upon subsequent application the injunction was dissolved with costs against plaintiff. Th· first defendant taxed a bill of costs and got credit for the amount from the plaintiff. Thereafter the second defendant got another bill taxed and moved for writs against the plaintiff. The District Judge ordered writs to issue, and from this order the plaintiff appealed.

Browne for the plaintiff appellant.

Cooke for second defendant respondent.

Cur. adv. vult.

On February 21 the Supreme Court set aside the order appealed from:—

Dias, A. C. J.—This order is manifestly bad. The first and second defendants became entitled to certain costs of a proceeding having reference to an injunction issued in this case. The first defendant got his costs taxed, and got credit for the amount against the plaintiff. The second defendant now comes forward and gets another bill taxed on his own account and obtains a writ of execution against the plaintiff. If this is good, and if there were ten defendants in the same position as these two defendants, the plaintiff would be bound to pay the costs ten times, which is absurd. The costs of the proceedings in question constituted only one set of costs, and can only be recovered as such, though the parties entitled to it may be many. The plaintiff is only liable to pay this one set of costs, which he must be taken to have done when he paid to or obtained credit against the first defendant.

Lawrie, J.—The question whether, when costs have been found due to several parties, payment to or settlement with one of them will relieve the judgment debtor from payment to the others, is one to which I could give no absolute or general answer. Each case must depend upon its peculiar circumstances, especially on the relations in which the judgment creditors stand to each other.

In the present case I have no hesitation in agreeing to set aside the order appealed against on the ground that the second defendant does not hold a judgment for costs.

An injunction was issued *ex parte* at the beginning of this suit before summons was issued.

On 17th December, 1886, Mr Ferdinands filed a proxy dated 3rd December, 1886, from all the defendants, which especially authorised him on behalf of the first defendant to apply for a dissolution of the injunction and on behalf of the other defendants to file answer.

A week afterwards, on the 11th December, the first and second defendants signed a second proxy to Mr. Schokman authorising him to appear and move that the injunction issued in the case be dissolved. This proxy is stitched up in the case, but it does not seem ever to have been properly filed, nor approved by the Court. On that day, 11th December, 1886, Mr. Schokman put in a written motion as "proctor for first defendant", with an affidavit from that defendant, and prayed that the injunction be dissolved. This was in conformity with the proxy of the 3rd December, which is the only proxy which can be recognised. I find throughout the subsequent proceeding Mr. Ferdinands, and not Mr. Schokman, appeared for the defendants.

In his order, dated 18th December, the District Judge speaks "of the points urged for the first defendant" in support of the motion and of his affidavit.

The injunction was dissolved and the plaintiffs were ordered to pay the costs of the motion.

The motion was, as I have shewn, one made only by the first defendant. The motion made subsequently by Mr. Ferdinands for the second defendant for writ to recover the costs is, in my opinion, not supported by terms of the proxy of the 3rd December (the only proxy in Mr. Ferdinand's favour) nor by the motion of the 11th December.

The order allowing writs dated 11th December, 1887, must be set aside with costs.

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Present:—CLARENCE, A. C. J., and DIAS, J.

(*September* 19 *and October* 1, 1890.)

D. C. Colombo (Special.) No. 33. } In the matter of THE JAFFNA AND BATTICALOA AGRICULTURAL AND COMMERCIAL COMPANY, LIMITED, in Liquidation.

Joint Stock Company—Official Liquidator—Appointment of "law agents" or proctors—Approval of Court—Payment of proctors' costs out of the assets of the Company—Ordinance No. 4 of 1861, section 100.

Sec. 100 of the Joint Stock Companies Ordinance (No. 4 of 1861) enacts: "The official liquidators may, with the approval of the Court, appoint such clerks or officers as may be necessary to assist them in the performance of their duties. There shall be paid to such agent, clerks, and officers such remuneration by way of fees or otherwise as may be allowed by the Court."

Held, that the above provision applies to the appointment of proctors.

And where the official liquidator had appointed certain proctors, and they had filed their proxy and had acted for the official liquidator in the proceedings but the approval of the Court had not been obtained for their original appointment;

Held, that the proctors so appointed were not entitled to be paid any costs out of the assets of the Company.

Messrs. Julius and Creasy, a firm of proctors, acted for the Official Liquidator, Mr. Hall, under a proxy given to them by him. Before the complete winding up of the Company Mr. Hall died, and the Court appointed Mr. A. Santiago as Official Liquidator. Upon a report made to the Court by Mr. Santiago it appeared there was still a sum of Rs. 4,482·40 undisposed of, and Mr. Santiago asked the Court for directions as to the disposal of this sum. Thereupon Messrs. Julius and Creasy made a claim of Rs. 979·60, as balance due on their taxed bill of costs from the late Official Liquidator. The District Judge (C. L. Ferdinands) disallowed this claim by his order of 11th July, 1890. From this order Messrs. Julius and Creasy appealed.

Browne for the appellants.

On October 1, 1890, the following judgments were delivered:—

CLARENCE, A. C. J.—This is an appeal by Messrs. Julius and Creasy, Proctors, from an order of the District Judge refusing their application to be paid a sum of Rs. 979·60, which they claim as costs due to them in the character of proctors to the Official Liquidator.

This application not appearing to have been made upon any formal notice to the Official Liquidator, although doubtless the Official Liquidator was aware of the application being made, we thought it proper by way of saving time and expense to direct that notice of this appeal be given to the present Official Liquidator with an intimation that he might, if he desired, be heard before us upon the appeal. The Official Liquidator has attended before our Registrar, and stated that he does not desire to be heard upon the appeal.

An order for a compulsory winding up was made in 1882, and Mr. Hall was appointed Official Liquidator. Mr. Hall thereupon signed on the 11th November, 1882, a proxy appointing Messrs. Julius and Creasy proctors to "act for him in the matter of the winding up of the said Company"; but no order was made by the District Judge under section 100 of the Ordinance for the appointment of a proctor. Messrs. Julius and Creasy have ever since acted as proctors for the Official Liquidator, and their bill of costs against the Official Liquidator has been taxed at Rs. 5,261·23. The Official Liquidator who appeared therein, Mr. Hall, is now dead; but before his death he paid them out of the assets of the Company a sum of Rs. 4,782 67 without any order of Court. There is still in Court as assets of the Company a sum of Rs. 4,482·40, and Messrs. Julius and Creasy now ask to be paid out of that fund the balance said to be due of their taxed bill.

The Section 100 of the Ceylon Ordinance is adopted from the 91st section of the Joint Stock Companies' Act of 1856. The English section runs thus:—

"The Official Liquidators may with the approval of the Court appoint a Solicitor or Law Agent, and such clerks or officers as may be necessary to assist them in the performance of their duties. There shall be paid to such Solicitor or Law Agent, clerks, or officers such remuneration by way of percentage or otherwise as the Court directs."

As sometimes happens in our legislation, this section has been not very happily adopted in the Ceylon Ordinance. We have no solicitors in Ceylon, though we have proctors. The section 100 of the Ceylon Ordinance runs thus:—

"The Official Liquidators may with the approval of the Court appoint such clerks or officers as may be necessary * * *. There shall be paid to such agent, clerks, and officers such remuneration by way of fees or otherwise as may be allowed by the Court."

Now this looks very much as though the framers of the Ordinance had it in their minds to authorize the appointment with the approval of the Court of some "law agents" However that may be, this much is in my opinion clear, that if it be sought to charge the assets of the Company with law agent's costs, the

sanction of the Court should have been obtained to the appointment of such law agents beforehand. Appellants' counsel argued, if I understood him right, that not only "solicitors", but also "law agents", were intentionally omitted from our Ordinance. If that be so, then the result would seem to be that our Legislature did not think it proper that over and above the remuneration to be allowed to the Official Liquidator the assets of the Company should be burdened with proctors' bills. My own opinion is, that the Legislature meant in adopting the English Act to retain the provision as to the appointment of law agents, or otherwise the retention of the word "agent" seems inexplicable. In my opinion, if appellants had been appointed under order signifying the approval of the District Judge, they would have been entitled *ex debito justitiæ* to be paid out of the assets their duly taxed costs; but in the absence of any express recognition of them as appointed with the approval of the Court, I cannot say that they are entitled. I see no reason to suppose that if the District Judge had been applied to at the outset by the Official Liquidator to approve of their appointment, that approval would have been withheld, appellants being a firm of respectability. I cannot accede to Mr. Browne's argument, that from the fact of their having acted all along as the Official Liquidator's proctors, and their proxy being filled in the paper book, we ought to infer the necessary approval of their appointment. Doubtless the occupants of the District Judge's bench, since that winding up began, were aware that the Official Liquidator was employing appellants as his proctors; but the question on this appeal is, whether *ex debito justitiæ* the appellants are entitled to be paid the bill out of the assets over and above the allowances which have been made to the Official Liquidator for his own commission and for clerical aid. It seems that the late Official Liquidator, besides paying appellants Rs. 4,782 without any order of Court, drew a sum of Rs. 2,830 for his own commission, and Rs. 3,540 for clerical work. The present learned District Judge says that the Official Liquidator should either have paid the proctors himself from his own allowances, or asked leave of the Court to pay them from the assets. A large sum of Rs. 4,782 has been paid by the Official Liquidator without any order of Court to proctors whose appointment the Court was never invited to approve. The District Judge, upon being now applied, to sanction a further payment, refuses to do so. Bearing in mind that it was the proctors' business to advise the Official Liquidator as to proper formalities and safeguards, we must decline to interfere with the District Judge's order. Appeal dismissed.

DIAS, J., concurred.

Present:—BURNSIDE, C. J., and DIAS, J.

(*October* 25 *and November* 8, 1887.)

D. C., Colombo, No. 82,945. } PHEBUS v. FERNANDO.

Assignee in insolvency—Action by—Leave of Court—Practice—Ordinance No. 7 *of* 1853, *sec.* 82.

The right of an assignee in insolvency to sue depends on leave of Court being previously obtained for the purpose, and the fact of such leave of Court having been granted must appear in the pleadings.

An action brought by an assignee without such leave of Court must fail, even though the defendant has not taken the objection by way of plea or demurrer.

W. M. de Kroes, by a codicil to his will, bequeathed Rs. 10,000 to his son, John Gregory de Kroes, for the purpose, as the codicil expressed it, of enabling him "perfectly to clear himself from all his debts", and to carry on the testator's business as a coach builder. John Gregory de Kroes was adjudicated insolvent on October 14. 1879. The testator, W. M. de Kroes, died on December 25, 1879, before John Gregory de Kroes obtained his certificate. The plaintiff was the duly appointed assignee of the insolvent estate of John Gregory de Kroes, and the defendant was the executor of the will and codicils of W. M. de Kroes, and had proved the same and obtained probate thereof. In this action the plaintiff as such assignee sued the defendant as such executor to recover the legacy of Rs. 10,000 left to the insolvent, but he had not applied for or obtained leave of Court to bring the action. The defendant in substance pleaded that he had expended a portion of the legacy in payment of the legatee's debts and had paid the legatee the balance. The District Judge (T. Berwick) held that the facts pleaded by defendant were no defence to the action, and gave judgment for the plaintiff. From this judgment the defendant appealed.

Dornhorst (*Wendt* with him) for defendant appellant.

Browne (*Ramanathan* with him) for plaintiff respondent.

On November 8, 1887, the following judgments were delivered :—

BURNSIDE, C. J.—There are in my opinion several objections fatal to this action; but I shall content myself with deciding the case on one alone. By the 70th sec. of the insolvency Ordinance No. 7 of 1853 property bequeathed to an insolvent before he obtains his certificate becomes absolutely vested in the assignee for the benefit of the creditors, and the assignee has the like remedy to recover in his own name as the insolvent himself might have had if he had not been adjudged insolvent.

Now, under this section the assignee of the insolvent has no larger remedies to recover a legacy than the insolvent himself would have had, and it is a first principle of law that a legatee cannot sue an executor to recover from him the amount of a legacy unless it is shewn that the executor has so dealt with the *corpus* of the legacy as to make him a personal debtor to the legatee for it.

Of this there is neither allegation, proof, nor admission in the pleadings in the present case, and the action would fail on that ground alone; but even if that defect did not defeat the action, by sec. 82 of the Ordinance, before an assignee can commence an action which an insolvent might have commenced, he must have first obtained the leave of Court to do so. The assignee's title therefore to sue depends upon leave obtained for the purpose, and not upon the fact that he is the assignee, and his title must be alleged in the pleadings. The allegation that he is an assignee standing alone is therefore valueless. It was urged that the defendant should have taken the objection by plea or demurrer. No doubt it would have been better it he had, but the fact that he has not done so cannot give plaintiff a right which the statute expressly takes from him. The prohibition is a negative one: "he shall not sue without leave." The objection is not a mere defence: it takes away the *locus standi* of the plaintiff to sue altogether. The action must be dismissed with costs.

DIAS, J.—The plaintiff has no status in Court, and this is not a defect which can be waived even if the defendant wishes to do so; but in this case he has done nothing of the kind.

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Present:—CLARENCE, A. C. J., and DIAS, J.

(*December* 18 *and* 19, 1890.)

P. C., Gampola, No. 9,559. } HERFT v. NORTHWAY.

Master and servant– Criminal liability of the master for the servant's acts—Mens rea—Breach of sec. 20 of the Ceylon Railways Ordinance, 1885.

A master is not criminally liable for his servant's acts unless he had the *mens rea*, or unles he is made so liable by statute.

The Magistrate (F. R. Dias) charged the defendant with having, on or about 21st October, 1890, "caused to be forwarded by the Railway Train..... 12 lbs. of dynamite, being of a dangerous nature, without giving notice thereof in writing or distinctly marking their nature on the outside of the packages", in breach of sec. 20 of the Ceylon Railways Ordinance (No. 26 of 1885).

That section enacts *inter alia*, "If any person shall carry upon the Railway any dangerous article, or shall deliver to such Railway official any such article for the purpose of being carried upon the Railway, without distinctly marking their nature upon the outside of the package containing the same, and likewise giving notice in writing of the nature thereof to the station master......he shall be liable to a fine not exceeding Rs. 200 for every such offence." Upon an acquittal of the defendant, the Attorney-General appealed.

The facts of the case sufficiently appear in the judgment of the Supreme Court.

Dumbleton, C. C., for the Attorney-General appellant.

Browne for defendant respondant.

On December 19, 1890, the following judgment was delivered :—

CLARENCE, A. C. J.—This is a prosecution under the 20th sec, of the Ceylon Railways Ordinance 1885, which prohibits the sending by Railway of any dangerous article unless the package containing the same be distinctly marked as required by the section and the required notice given to the Railway officials. Defendant was prosecuted for sending dynamite by Railway without the statutory precautions. It would be difficult to conceive of any statutory prohibition more deserving, in the interest of the public, to be strictly enforced.

The charge as framed by the Magistrate does not follow the precise words of the Ordinance, but I need not dwell upon this. The substance of the accusation against defendant is that he by the hand of his servant delivered to the Railway officials at Gampola Station two packages containing 12 lbs. of dynamite without observing the statutory precautions. The facts are not in dispute. The defendant had this dynamite, and also a quantity of glassware and other goods of a non-dangerous character which he wished to send away. This property was stored in Messrs. Walker's store. Defendant left his residence, after giving his servant instructions for the forwarding of the property, and he specially ordered the servant to send the dynamite by road. The servant in consequence (according to his own account) of an unsufficiency of coolies departed from defendant's instructions, and sent the dynamite to the Railway.

In my opinion the Magistrate has taken a correct view of the law, and the appeal against his decision must be dismissed. There is no doubt as to the general rule. A man may be civilly liable for a misfeasance of his servant done in the course of his employment, but to render the master criminally responsible you must show the *mens rea* on his part, unless the Legislature has thought proper to enact that the master shall be criminally responsible even without the *mens rea*; and as the judges pointed out in *Christolm*

v. Doulton, L. R. 22 Q. B. D. 736, it lies on those who assert that the Legislature has enacted such a departure from the general principle to make that out convincingly by the language employed. As Baron Pollock tersely put the matter in *Roberts v. Woodward*, L. R. 25 Q. B. D. 412, "we know of no instance in which a master is criminally responsible for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master". In the present case neither of these exceptional conditions is fulfilled. Appeal dismissed.

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Present:—CLARENCE, A. C. J.

(*October* 23 *and* 30, *and December* 12, 1890.)

P. C., Badulla, No. 6,418. } FRASER v. JOHN SILVA and another.

Stamps—sale of, by unlicensed vendor—"forfeit"—criminal or civil remedy—Ordinance No. 23 *of* 1871, *section* 49.

Section 49 of the Ordinance No. 23 of 1871 enacts, that if any person, other than the Commissioner or Government officer mentioned in the Ordinance, shall sell or offer for sale any stamp without having obtained a licence authorizing him in that behalf as provided in the Ordinance, "he shall for every such offence forfeit the sum of one hundred rupees".

Held, that under the above enactment a person is not liable to be criminally prosecuted, but only to be sued civilly, and adjudged to forfeit the sum specified.

In this case the Police Magistrate charged the 1st defendant with criminal misappropriation of a Rs. 5 revenue stamp, the property of the Ceylon Government, and the 2nd defendant with having abetted the 1st defendant in that offence. He also charged the 2nd defendant in another count, as follows: "That you did on or about 18th July, 1890, not being the Commissioner of Stamps nor a Government officer specially authorised to sell stamps, nor a licensed vendor of stamps, sell a stamp of Rs. 5 denomination, and did thereby commit an offence, for which you shall forfeit Rs. 100 as provided in section 49 of Ordinance 23 of 1871."

The 1st defendant was convicted on the charge framed against him and sentenced, but he did not appeal. The 2nd defendant was convicted on both the charges framed against him, and was sentenced on the first charge to 6 months' rigorous imprisonment, and on the second charge was adjudged to forfeit the sum of Rs. 100. The 2nd defendant thereupon appealed.

The appeal was first argued before Clarence, A.C.J. on October 23, 1890, *Dornhorst* (*Sampayo* with him) appearing for 2nd defendant appellant, and *Fisher, C. C.*, for the complainant respondent. But his lordship having subsequently desired further argument on the procedure under the Stamp Ordinance, the appeal was again heard on October 30, 1890.

Dornhorst (*Sampayo* with him) for 2nd defendant appellant. The use of the word "forfeit" clearly shews that it was not the intention of the ordinance to make this act criminal. The description of it as an offence makes no difference as regards procedure. The rule is thus laid down in 1 Russel 88: "where the statute making a new offence only inflicted a forfeiture and specified the remedy an indictment will not lie." *R. v. Wright*, 1 Beav. 543; *R. v. Douse*, 1 Ld. Raymond 672. He also cited *P. C., Galle* 88,466, Grenier '74 Pt. 1, p. 43, and *P. C., Kandy, No.* 900, 7 S. C. C. 66.

Layard, S. G., for the complainant respondent. The words of the Ordinance are, "he shall for every such offence forfeit a sum of Rs. 100." *Offence* is an apt word to describe a criminal matter. A wilful disobedience to the law of the land is a crime. As Lord Bramwell in *Mellor v. Denham*, 49 L. J. M. C. 89 put it, it may be a crime of the minutest character but still a crime. In that case a judgment of the Queen's Bench Division upon a case stated by the justices upon an information to recover a penalty for breach of a bye-law was held to be a judgment "in a criminal matter". See also judgment of Brett L. J. in the case of Exparte *Whitechurch*, in re *an Order made by the Justices of Nottingham*, 50 L. J. M. C. 99. Section 289 of the Ceylon Penal Code makes wilful disobedience of any provision of any ordinance punishable. It is submitted therefore that the appellant was properly prosecuted criminally.

On December 12, 1890, the following judgment was delivered:—

CLARENCE, A. C. J.—Appellant appeals first against a conviction and sentence of imprisonment on the charge of abetting one Silva in the offence of criminally misappropriating a Rs. 5 revenue stamp, the property of the Government.

Silva and appellant were jointly charged and tried, Silva with the principal offence, and appellant with abetting him. The evidence upon which appellant has been convicted is evidence that he sold a Rs. 5 revenue stamp to a man who came to the Land Registrar's Office, where appellant was employed as a book binder. I find no material whatever in the case conecting that stamp with any stamp traced to Silva. Silva's statements are, of course, inadmissible against appellant. If there were any material connecting appellant with Silva, appellant's refusal to make any statement in answer to the charge would leave such material unrebutted. So far as concerns appellant, however, there

is merely evidence going to show that on July 18th appellant sold a Rs. 5 stamp. The stamp, which forms the subject of the charge, is said by Mr. Fraser to have been stolen from the Kachcheri "at the latter end of July" Appellant's appeal against the conviction on the charge of abetting Silva's offence succeeds on the ground that there is no material connecting him with anything done by Silva.

Appellant further appeals from a conviction purporting to be a conviction under sec. 49 of the Stamp Ordinance 23 of 1871 and a sentence thereunder that he do forfeit the sum of Rs. 100. This is a conviction on a charge of selling a Rs. 5 stamp, not being a licensed stamp vendor. I should have been glad to have had an opportunity of consulting decisions bearing upon the question involved in this second appeal; but my continued absence from Colombo on circuit since this appeal was argued prevents my doing so. Upon a consideration, however, of the section under which the second charge is framed, I am of opinion that it contemplates a civil, and not a criminal, liability. It is true that the word "offence" is used, but the sanction enforceable against the offender is merely declared to be that he "forfeit" Rs. 100. A contravention of law which is *malum prohibitum* only, and not *malum in se*, should not be treated as a matter for criminal procedure, unless the Legislature has clearly so directed; and I am not prepared here to say that this defendant, for selling, as alleged, this stamp, without having any licence to sell stamps, is liable to anything more than to be sued civilly and adjudged to forfeit the Rs. 100. Therefore, in my opinion the proceeding under which appellant was criminally charged jointly with Silva in this matter was not legal.

I acquit appellant on the first count, and quash the second count and conviction under it.

———:o:———

Present:—CLARENCE, A. C. J., and DIAS, J.

(*December* 16 *and* 18, 1890.)

D. C., Colombo, (in Insolvency) No. 1,697. — In the matter of the Insolvency of MIRRINNEGE PHILIPPO APPUHAMY.

Insolvency—Appeal—Security for costs—Civil Procedure Code, sec. 756.

The provisions of section 756 of the Civil Procedure Code as to security for costs of appeal apply to insolvency proceedings, and consequently no appeal can be entertained from an order of the District Court in insolvency proceedings without such security being given.

The insolvent appealed from an order of the District Court suspending his certificate for the twelve months, but he gave no security for costs of appeal.

Pereira for the insolvent appellant.

Morgan for the opposing creditor respondent.

Cur. adv. vult.

On December 18, 1890, the following judgment was delivered:—

CLARENCE, A. C. J.—The insolvent appeals from an order of the District Court. A preliminary objection has been taken to our entertaining the appeal, upon the ground that no security has been given for the appeal costs.

In my opinion the objection must prevail. It is unnecessary to bestow consideration upon the old Rules and Orders as to appeals, dated 1st October, 1833. They have been repealed by the Civil Procedure Code. Sec. 6 of the Insolvency Ordinance declares that all orders of District Courts made under that Ordinance shall be appealable to this Court, and that such appeals "shall be subject to such regulations as now exist or shall be hereafter made by any rule or order of the Supreme Court". There are no orders of the Supreme Court in the matter now; but chap. lviii. of the Code deals with appeals generally, and sec. 756 requires that security be given. It is admitted that none has been given. It was not contended on the part of the insolvent that there is no party to benefit by security for appeal costs.

In my opinion this appeal must be rejected, and the respondent, the opposing creditor, must have his costs of appearing to take the objection.

DIAS, J., concurred.

———:o:———

Present:—BURNSIDE, C. J., and CLARENCE, J.

(*July* 16 *and* 23, 1889.)

D. C., Matara, No. 34,972. — WIRASINGHE v. DIAS ABEYSINGHE.

Vendor and purchaser—Trespass by a third party—Failure of action by purchaser against trespasser—Notice of such action to purchaser—Action for recovery of purchase money—Averment of want of title—Pleading—Roman Dutch Law.

Where a purchaser of land has failed in an action (of which he gave the vendor notice) against a third party who withholds possession from the purchaser;—

Held, that the purchaser's cause of action against the vendor, if any, is a breach of contract on the vendor's part in contracting to transfer that which he had no right to transfer.

Held, that in such action, as distinguished from the action available under the Roman Dutch Law to a purchaser who has been sued and evicted by a third party in a legal proceeding of which the vendor

had due notice, the absence of the vendor's right to transfer must be averred and proved.

The plaintiff in his libel in substance averred that the defendant by a certain deed had "let to the plaintiff the paraveny share of the crop" of a certain land, that plaintiff had assigned his rights under this deed to one Baboris, that Baboris having been prevented from taking the crop by a third party had instituted a certain action against "the disputant", of which he gave notice both to defendant and plaintiff, that notwithstanding defendant's evidence in support of her right Baboris had been non-suited in that action, that subsequently Baboris sued plaintiff and recovered Rs. 240, and "that by reason of the premises an action hath accrued to plaintiff to have and recover from defendant Rs. 240".

The defendant demurred to the libel on various grounds, the first of which was the ground that "the plaintiff cannot maintain this action against the defendant, and the libel discloses no cause of action against her".

The defendant also pleaded on the merits.

At the trial no evidence was led by the plaintiff tending to shew that the defendant had no right to dispose of the land or its produce. The District Judge gave judgment for the plaintiff, holding that defendant was bound by the judgment in the case brought by Baboris, of which she had notice, and in which she had given evidence as witness, and that it was therefore unnecessary to discuss or decide whether or not the deed given by her to plaintiff was valid as against a prior lease given by her father during her minority to the party who opposed Baboris and was sued by him.

From this judgment the defendant appealed.

The facts of the case sufficiently appear in the judgment of Clarence, J.

Dornhorst for defendant appellant.

Seneviratne for plaintiff respondent.

Cur. adv. vult.

On July 23, 1889, the following judgments were delivered:—

CLARENCE, J.—This action arises out of the following circumstances. On August 24, 1881, defendant, a young woman, who had attained her majority in December, 1880, purported to transfer to plaintiff, in consideration of a sum of Rs. 120 paid down, her right to the paraveni share of the crop then ripening on certain land. Plaintiff assigned his interest under this instrument to one Baboris. The instrument abovementioned recites, that defendant's title was derived under a certain "testamentary case", meaning doubtless that she acquired it under the will or intestacy of some deceased person. In 1876 defendant's father had purported on her behalf to lease the land in question to one Don Samuel for four years, beginning August, 1878, and ending August, 1882, and Baboris, when he endeavoured to take the crop, found himself interfered with by Don Samuel. Baboris brought some action against defendant's father and Don Samuel to obtain relief under these circumstances, and called defendant as a witness; but his action failed. Baboris then sued plaintiff, claiming to recover back from him the consideration money paid for his assignment from plaintiff. Plaintiff did not contest that action, but consented to a judgment for Rs. 240. Thereafter plaintiff gave Baboris a promissory note for Rs. 240 and obtained from him a receipt in discharge of the judgment. Plaintiff now sues defendant claiming to recover Rs. 240 from him as damages. The District Court has given plaintiff judgment for Rs. 120 (the amount which he paid defendant) with interest, and defendant appeals.

The facts above recited are not in dispute.

It is impossible to support this judgment, because unfortunately for plaintiff his libel is based on a misconception, and discloses no cause of action. The plaintiff's real cause of action, if he has any, must be a breach of contract on defendant's part in contracting to transfer to him, by her instrument of August 24, 1881, that which she had no right to transfer. But nowhere in plaintiff's libel is it averred that defendant had no right to make the transfer, and nowhere is it proved that she had no right. The draftsman who framed the libel seems to have supposed that it was enough to aver the transfer by defendant to plaintiff, the assignment by plaintiff to Baboris, the failure of Baboris in his action against the defendant's father and the lessee under defenant's father, the fact that plaintiff and defendant had "notice" given them of the pendency of that action, and the result of Baboris's action against plaintiff. It is quite clear that defendant and her father between them have sold the crop in question twice over, but plaintiff has not properly raised the issue—which sale was entitled to prevail,—and he has not proved that the father's sale was the one entitled to prevail. The misconception has evidently arisen from a misunderstading of the Roman Dutch Law as to the notice of action given by a purchaser to his vendor when the purchaser is sued by some third party seeking to evict him. See *Voet* xxi. 2.20, and see also 1 *S. C. R.* 54. The circumstance that Baboris gave notice of his action against the lesse under defendant's father to defendant as well as to plaintiff does not make defendant either party or privy to that action, so as to render the result of the action binding as between him and the plaintiff. Possibly the fact of defendant having made such and such statements as a witness in that case ought or ought

not to be material if plaintiff had properly raised the issue as to the right to transfer to plaintiff. But plaintiff cannot recover from his transferor by merely establishing that his own transferee did not enjoy, and failed in an action against the person who prevented him from enjoying since, plaintiff and his transferor being both cognizant of that action.

The plaintiff has not averred that the defendant had no title to transfer to him ; and if he had averred it, he has not proved it. We do not know what was the title under which the land in question devolved on defendant when as yet she was a minor. Nor do we know what powers her father had over that land, or how they arose. The judgment cannot be supported.

The case might have been disposed of at once upon a demurrer which is contained in the first paragraph of defendant's answer, and which seems not to have been pressed. The defendant, however, filed a lengthy rambling answer, in which she purported to demur upon various and sundry grounds untenable as matters of demurrer. I am disposed to think that plaintiff should have an opportunity, under the circumstances, of amending his libel, so as to try the real question between him and defendant, and I would make the following order on this appeal.

Set aside the judgment. Plaintiff to pay costs of this appeal and costs in the District Court to date, save costs of the trial day of which day no costs are given.

Plaintiff do have one month from return of this case to the District Court to pay the above costs, and amend his libel, the payment of the costs being a condition precedent to the amendment. In the event of the costs not being paid and the libel amended in due time, plaintiff's action do stand discharged with costs.

BURNSIDE C. J.,—I agree with my brother Clarence. At the argument I intimated my opinion that the action was misconceived, and that the plaintiff had not recognized the difference between the Roman Dutch action of warranty and the right of action for damages for breach of contract by his vendor or lessor.

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Present:—BURNSIDE, C. J. and CLARENCE, J.

(*July* 12 *and* 23, 1889.)

D. C., Negombo, No. 15,395. — CONSTANTINU VEDERALE and others v. HENDRICK PERERA and others.

Action in tort—Plea of minority—Minor appearing without guardian at litem—non-suit—practice.

Where a defendant appeared to an action by proctor and pleaded minority,—

Held, that the plea of minority could not be entertained and a decree of non-suit entered upon such plea was bad, and that it was for the defendant, if he so desired, to have taken steps for the appointment of a guardian *at litem.*

Held, per BURNSIDE, C. J, that a person can always maintain an action in *tort* against a minor without having a guardian *ad litem* appointed.

The plaintiffs sued the defendants in ejectment. The defendants, six in number, appeared to the action by a proctor and filed one answer, whereby, *inter alia,* the 6th defendant pleaded that he was "a minor, being only 14 years of age, was not liable to be sued, and ought not to have been joined in this action". To this plea the plaintiffs, in their replication, replied that "this being an action of *tort* the said plea is untenable", and proceeded to state that "the 6th defendant was close on his 19th year of age, and was properly joined as a party defendant".

On the day of trial (21st March, 1889) the defendant pressed the plea of minority as a preliminary objection, which the Court upheld, and upon the motion of the defendants the District Judge non-suited the plaintiffs. From this order of non-suit the plaintiffs appealed.

Dornhorst for plaintiffs appellant.

Seneviratne for defendants respondent.

Cur. adv. vult.

On July 23, 1889, the following judgments were delivered :—

BURNSIDE, C. J.—I know of no rule whereby it is necessary that a plaintiff having a cause of action against a minor for *tort* must have a guardian to him appointed before he sue him. If there be such a ruling, it is most mischievous and unreasonable. How is a plaintiff to know the age of his *tort-feasor*, or who is the proper person to make his guardian, or who will consent to be? I can understand the rule that an infant must appear by guardian or *prochein ami* before he will be heard, and this is for the protection of the plaintiff that there may be some one responsible for costs. In this case it is the infant who sets up his infancy in answer to an action for *tort,* and the plaintiff has replied, without admitting or denying the infancy, that his plea is no answer to the action, and the plaintiff has been non-suited because he did not have a guardian *ad litem* appointed, the Court having taken it for granted that the defendant was a minor, of which there is not a tittle of proof. Even supposing that the plaintiff was bound to have a curator appointed, his being non-suited for not doing so cannot be supported. A non-suit can only take place with the assent of the plaintiff at the trial, and there has been no trial, and the plaintiff never assented, because he has appealed against it. The utmost that should have been done was to stay the proceedings until the plaintiff had done what was required of him, and which perhaps it was im-

possible for him to do. But in my opinion the plaintiff was in no way called on to accept the defendant's statement, that he was a minor, as a fact, and that if it were necessary that the defendant should appear by curator, that was a matter for the plaintiff, and not the defendant, to complain of; and that the plaintiff had the right to go on with his suit upon his answer to the defendant's plea of minority.

The non-suit is therefore set aside.

CLARENCE, J.—This non-suit is wrong. The plaintiffs aver title to a piece of land, and charge the defendants with ousting them therefrom. The defendants all join in one answer, in which they treat the plaintiffs, who are nine in number, as one person, husband of a certain woman, and aver that that person is entitled to 1/8 only of the land. They further claim shares for themselves, and the 6th defendant avers himself to be a minor. The plaintiffs filed an application, in which they admitted the 6th defendant to be a minor; and so we may assume the 6th defendant to be so. When a defendant, who is a minor, neglects to appear, the plaintiff may move the Court to appoint a guardian *ad litem*; but when the defendant had appeared by a proctor, it is for the defendant to take proceedings to that end. The non-suit must be set aside and the case sent back to the District Court for proceedings in due course. With regard to costs, plaintiffs ought to be indemnified against the costs of this non-suit in both courts; but there is difficulty, as the case stands, in making an order for costs against the infant. I think that we should make no order now as to costs, and leave plaintiffs to move either District Court or this Court in the matter of costs.

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Present:—CLARENCE, A. C. J.

(*December* 18, 1890, *and January* 10, 1891.)

C. R., Nuwara Eliya, No. 32. } APPU SINNO v. SCOTT COULTS.

Master and servant—Action for wages—Right of master to mulct servant in wages for misconduct.

A master has no right to stop any portion of his servant's wages for misconduct.

The defendant was a monthly servant under the plaintiff, and brought this action for balance wages due for a certain month and for damages for wrongful dismissal. As to the amount claimed as balance wages, the defendant pleaded that the plaintiff had been guilty of gross misconduct, in that he had committed a severe assault on a fellow-workman, and that defendant "was therefore entitled to claim a forfeiture of plaintiff's wages to the extent of Rs. 10", viz., the amount claimed.

In evidence the defendant stated that he had stopped Rs. 10 from the plaintiff's wages as a fine for striking another servant. The Commissioner gave judgment for the plaintiff, and the defendant appealed.

Dornhorst for defendant appellant.

Wendt for plaintiff respondent.

Cur. adv. vult.

On January 10, 1890, CLARENCE, J., affirmed the judgment, holding that "defendant had no legal right to stop Rs. 10 from plaintiff's wages".

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IN HER MAJESTY'S PRIVY COUNCIL.

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, AND LORD SHAND.

D. C., Negombo, No. 14,357. } MURUGASER MARIMUTTU v. CHARLES HENRY DE SOYSA.

Mortgagee in possession—Purchaser at sale under mortgage decree—Right of purchaser from original owner subsequent to mortgage—Ejectment—Action to redeem.

T was mortgagee in possession of certain property belonging to N, who subsequently conveyed the property to plaintiff, subject to T's mortgage, which the plaintiff covenanted with N to pay off. T sued N on his mortgage in an action to which plaintiff was no party. He obtained judgment and a mortgagee's decree; and having issued writ, purchased the property himself. T subsequently sold the property to S, and defendant purchased it under writ against S and entered into possession.

Held that the plaintiff could not sue the defendant in the ordinary action of ejectment.

Held that the effect, if any, of plaintiff not being a party to the suit between T and N on the mortgage was to replace T or any person deriving title from him in the position of mortgagee in possession as between plaintiff and T or such person, and that consequently the plaintiff's action against defendant, if any, was an action to redeem.

The plaintiff appealed to the Supreme Court from the judgment of the District Court of Negombo dismissing his action. The Supreme Court affirmed the judgment of the Court below on July 4, 1887*, and their lordships' judgment was brought up in review preparatory to an appeal by the plaintiff to the Privy Council. The Supreme Court in review affirmed the previous judgment on July 31, 1888, whereupon the plaintiff appealed to the Privy Council in due course.

This appeal having come on before the Lords of the Judicial Committee of the Privy Council, the judg-

*Vide 8 S. C. C. 121.

ment of the Supreme Court was affirmed on November 12, 1890. The judgment of the Court delivered by Lord Hobhouse was as follows :—

In this case the plaintiff Marimuttu claims possession of the Dicklande Estate under a conveyance from one Nannytamby dated the 26th of September, 1878. That deed of conveyance shows that a person named Tambyah was mortgagee in possession of the estate, and that the amount of his mortgage was unascertained; that it was the subject of a suit pending in the Supreme Court, and was to be decided by principles laid down by the Supreme Court; and the plaintiff covenants with his vendor that he will pay and discharge all sums of money due to Tambyah as mortgagee in possession of the premises. Whether those accounts have been completed and the sum has been ascertained is a matter of dispute between the parties. There is an order of the District Court of Kalutara on the subject, but it is contended by the plaintiff that the accounts which are affirmed by that order have not been taken in accordance with the principles laid down by the Supreme Court. In the view their lordships take of the case it does not signify whether the accounts have been finally ascertained or not. The nature of Tambyah's mortgage was this. In point of form he was the purchaser, out and out, of the estate from Nannytamby. But the conveyance to him was disputed by a creditor of Nannytamby, who instituted a suit for the purpose of setting it aside as fraudulent. In that suit the Court held the true contract between the parties was not a contract of sale out and out, but that money had been advanced, and by its decree of July the 2nd, 1875, it ordered that Tambyah should stand as mortgagee in possession for the amount of money advanced, and it went on to decree that when the accounts had been taken, and the amount due upon the mortgage ascertained and repaid by Nannytamby to Tambyah, Tambyah should be bound to re-transfer the estate to Nannytamby. Therefore Tambyah was owner of the estate to the extent that he could properly remain in possession of it until he was paid the amount which was due on the transactions between him and Nannytamby. Subsequently to the sale to the plaintiff in 1878, Tambyah took certain proceedings under which sales of the estate were made. The details are a little complicated, and it is not now material to go into them. But ultimately the defendant became the purchaser of the estate at a fiscal's sale, and he now claims to be absolute owner of the estate under that sale. The plaintiff contends that he was no party to the proceedings by Tambyah, and that he is not bound to recognise the sale to the defendant. Whether that is so or not has been the subject of much argument, and was the subject of difference among the Judges in the Court below. But for the purpose of the present decision, and for that purpose only, their lordships will assume that the plaintiff is right in his contention. Supposing he is right, what is the effect? The effect must be to replace Tambyah, or anybody who stands in the shoes of Tambyah, in the position which Tambyah held under the decree of the Court as mortgagee in possession. He would be in lawful possession of the estate until he is paid the money due to him on the transactions between Tambyah and Nannytamby.

The plaintiff now asks to be declared the owner of the Dicklande Estate, and that the defendant be declared not entitled thereto and be ejected therefrom, and the plaintiff placed in possession thereof; and he further asks for damages, and for a sum of 15,000 rupees a year during the time for which the defendant has been in possession. Not a single word about payment of the mortgage which is due either to Tambyah or to the defendant. What the plaintiff desires by his plaint is to get into possession without any payment at all. That seems to their lordships to be in the teeth of the decree of 1875; to be in the teeth of the contract which the plaintiff entered into when he made his purchase from Nannytamby, and to be a glaring injustice towards the defendant, who has honestly paid for his estate and is entitled at least to all that Tambyah himself could claim.

Their lordships were told that there were some authorities in the Courts of Ceylon which would show that such an injustice as that was lawful. They hardly expected that such authorities would be produced; at all events they have not been produced; and their lordships must hold that there is no ground in justice and in law for the relief that the plaintiff asks.

This is a case in which the plaintiff should be held strictly to the relief that he prays for. It is suggested at the bar that he may be entitled to redeem. He may be so entitled, and for the purpose of this decision it is assumed in his favour that he is so entitled; but he does not ask it, and their lordships do not know at this moment that he wishes it. On the contrary, so far as the materials on this record go, their lordships have reason to think that he does not wish it, because in 1882 he did institute a suit to redeem Tambyah, and he apparently never proceeded beyond the filing of the plaint. Now he prays for a totally different relief, and it must be taken that he does not desire any relief except that which he prays for. That relief cannot be given him for the reasons indicated above, and his plaint must therefore be dismissed.

The result is that this appeal must be dismissed,

and with costs, and the judgment of the Court below affirmed.

Their lordships will humbly advise Her Majesty in accordance with that opinion.

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IN THE SUPREME COURT OF CEYLON.

Present:—CLARENCE, A. C. J.

(*January* 22 *and* 26, 1891.)

P.C., Colombo, No. 14,378. } IRESON v. WHITTLE.

Police Court—Jurisdiction—Certificate of the Attorney-General—Summary trial—Consent of defendant—Ordinance No. 26 *of* 1885, *section* 39—*Criminal Procedure Code, sections* 9 *&* 226.

Since the Criminal Codes, where an enactment creating a statutory offence has fixed the maximum punishment beyond the Police Court jurisdiction, and does not expressly provide for the trial of such offence by the Police Court, a Police Court cannot summarily try such offence, except by leave of the Attorney-General under section 9 of the Criminal Procedure Code, or by consent of the defendant under section 226 of the Criminal Procedure Code.

In a charge under section 32 of Ordinance No. 26 of 1885, against a railway official, for being in a state of intoxication whilst employed upon the railway, the punishment provided for such offence being imprisonment not exceeding one year, or fine not exceeding Rs. 200, or both;—

Held, that the Police Court could not try the offence summarily, except by leave of the Law Officers of the Crown as provided in section 39 of that Ordinance, or in section 9 of the Criminal Procedure Code, or by consent of the defendant under section 226 of the Criminal Procedure Code.

The defendant, who was a railway engine-driver, was tried summarily by the Police Court, and convicted upon a charge under section 32 of the Ceylon Railways Ordinance (No. 26 of 1885), for being in a state of intoxication whilst actually employed upon the railway, and was sentenced to two months' rigorous imprisonment. The defendant thereupon appealed.

Dornhorst for appellant.

Layard, S. G, for respondent.

Cur adv. vult.

On January 26, 1891, the following judgment was delivered:—

CLARENCE, A. C. J.—Three points were argued before me upon this appeal. First, it was urged, and very much pressed, that if the conviction be upheld, this Court should at all events commute the sentence of imprisonment for a fine. I may say at once that if the conviction be upheld, I would not interfere with the discretion exercised by the Magistrate. The offence of which the appellant has been convicted is, that he being a railway engine-driver in charge of a train, was intoxicated while so on duty. For that offence the Magistrate, after taking into consideration what appellant will probably suffer from the loss of his situation, has sentenced him to undergo two months' rigorous imprisonment. A tipsy engine-driver imperils the lives of a train full of passengers, and I certainly would not, on the score of undue severity, interfere with the sentence which the Magistrate has passed.

Secondly, appellant's counsel argued, upon the merits, that the evidence did not establish the charge; and thirdly, it was contended that the Police Court had no jurisdiction to try the charge summarily. This objection to the Police Court jurisdiction does not appear to have been taken in the Court below, although defendant was assisted then by a Proctor; neither does it appear in the appeal petition. I am bound, however, to consider it, because if the Police Court had no jurisdiction the conviction will have to be quashed.

The charge falls under section 32 of the Railways Ordinance 1885, and the maximum punishment authorised by that section is one year's imprisonment and Rs. 200 fine, both of which are beyond the ordinary powers of the Police Court. Section 39 of the Ordinance expressly provides for the summary disposal by the Police Court of charges laid under this Ordinance if a certificate be obtained from the Attorney-General or Solicitor-General. No such certificate, however, was obtained, and Mr. Solicitor, who appeared for the appeal, stated, that although he would, if appealed to, have granted the certificate, no application was made for a certificate until after the conviction, which of course was too late. It is certainly to be regretted that the Government Proctor, who conducted the prosecution in the Police Court, overlooked this matter. Neither was any formal consent obtained from the defendant under section 226 of the Criminal Procedure Code.

Before the present Criminal Codes were enacted there was no statutory scale of punishments, save as to a few statutory offences, and many kinds of offences were held to be within the jurisdiction of the Police Court if the criminal dimensions of the particular instance in question demanded no higher punishment than a Police Court could inflict. An assault or theft, for instance, might be of criminal dimensions demanding a penalty beyond the power of a Police Court or even of a District Court to inflict; but if the criminal dimensions appeared upon investigation to demand no higher sanction than a Police Court could command, the Police Court was held to have jurisdiction to try and dispose of the charge. Under the new procedure created by the Codes, all the offences mentioned in the Penal Code are provided for in a schedule to the Criminal Procedure Code, which specially declares by what Courts each

offence shall be triable. The charge in the present case is of an offence not within the Penal Code, but created by a subsequent statute. Section 9 of the Criminal Procedure Code gives the Police Court summary jurisdiction over offences made cognizable by a Police Court by the Code or any law in force in this Colony. Now, I cannot say that the offence now in question has been made cognizable by the Police Court by any law here in force. The same section also gives the Police Court summary jurisdiction over breaches of "any enactment making penal any act, not in itself an offence, and which would otherwise not be cognizable by a Police Court by reason of the amount of punishment which may be inflicted in respect thereof, if a certificate shall be presented to such Police Court signed by the Attorney-General, to the effect that he is content that such offence or act shall be tried by such Police Court", and no such certificate has been given here. The conclusion I draw from all this is, that when a statutory offence has been created since the Codes, and the statute creating such offence has fixed the maximum of punishment at a figure beyond Police Court power, then the offence is not summarily triable in the Police Court, except by leave of the Law Officers of the Crown or by consent of the defendant taken under section 226 of the Procedure Code. This being so, I am bound to hold that the Police Court in the present case had no jurisdiction to dispose of the matter under its summary procedure. Section 494 of the Procedure Code does not touch the case, because its operation is limited to orders of "a Court of competent jurisdiction".

I have no alternative but to quash this conviction. I therefore quash the conviction and send the case back to the Police Court in order that the Magistrate may take further proceedings, either by obtaining the Attorney-General's certificate or by committing defendant for trial before the District Court, or otherwise.

I do not consider that it would be proper for me now to express the opinion which I have formed upon the second contention argued by appellant's counsel.

Conviction quashed, and case remitted to the Police Court for further proceedings in due course.

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Present:—CLARENCE, A. C. J., and DIAS, J.

(*December* 19, 1890, *and January* 23, 1891.)

D. C., Colombo, Insolvency, No. 1,728. — In the matter of the insolvency of DON SOLOMON FERNANDO.

Insolvency—Lying in prison for debt—Discharge from custody—Surrender—Ordinance No. 7 of 1853, section 36.

Section 36 of Ordinance No. 7 of 1853 enacts, *inter alia*: "Where any person, who has been adjudged insolvent and has surrendered and obtained his protection from arrest, is in prison or in custody for debt at the time of his obtaining such protection, the Court may * * * order his immediate release either absolutely or upon such conditions as it shall think fit".

The same section enacts: "Whenever any insolvent is in prison or in custody* * if he be desirous to surrender," he shall be brought up by warrant directed to the person in whose custody he is confined.

Where a person was adjudged insolvent, he having lain in prison for debt over 21 days, and was yet in custody;—

Held, that he could not be released from custody before he has surrendered within the meaning of the above section of the Insolvency Ordinance.

This was an appeal from an order of the District Court releasing the insolvent from custody. The respondent having been in prison for over 21 days under writ for a Crown debt, petitioned for adjudication of insolvency, and was adjudged insolvent by an order of the Supreme Court made upon an appeal from a decision of the District Court (9 *S.C.C.* 107). An application was now made on his behalf that he be released from custody, and the Attorney-General opposed the application. The District Judge considered that he had the power under section 36 of the Ordinance to order the "release of the insolvent from custody to enable him to take the necessary steps to perfect the act of insolvency he has committed by surrendering, and otherwise conforming to the provisions of the Ordinance", and he ordered accordingly. From this order the Attorney-General appealed.

Layard, S. G., for the appellant. The insolvent is not entitled to be released from custody under section 36 of the Ordinance before he has surrendered, which he has not yet done. He was in custody, and never came before the Court. [DIAS, J : What is surrender ?] Surrender includes coming before Court and submitting to its jurisdiction in the insolvency proceedings. [CLARENCE, A.C. J.: The insolvent has asked to be adjudicated insolvent. Is that not a submission ?] It is submitted not. According to English practice, as the object of the discharge is to enable the insolvent to assist the assignee, the proper time for the application is not until after the appointment of the assignee. (*Griffith and Holmes* (1869) 912.) Here no assignee has yet been appointed. It is submitted that the order of release under the circumstances is wrong.

Canekeratne for respondent. Section 36 contemplates four distinct states of circumstances: (1) when insolvent is not in custody, (2) when he is in custody, (3) when he is in custody and is desirous of surrendering, and (4) when he is in custody and seeks protection. The present case is one where the insolvent is in custody, and the Court has the power under section

36 to discharge him from such custody. The insolvent need not have previously surrendered for this purpose. Surrender means submitting *to be examined*, and this is not until the last sitting takes place. Section 30 provides for the appointment of two public sittings "for the insolvent to surrender and conform", the last of which sittings is to be the day limited for his examination. The meaning of the word "surrender" is further shown from section 161 of the corresponding English Act, 12 and 13 Vict. c. 106, which provides that if any bankrupt apprehended by any warrant "shall, within the time allowed for him to surrender, *submit to be examined* and in all things conform, he shall have the same benefit as if he had voluntarily surrendered". As to the argument that the insolvent cannot be discharged until the choice of assignee, it is only for the creditors, and not the insolvent, to take steps for the appointment of an assignee ; and if they chose not to do so, the insolvent could never be released, which was never intended by the Ordinance.

Cur. adv. vult.

On January 23, 1891, the following judgment was delivered :—

CLARENCE, A. C. J.—The respondent by an order of this Court made on his appeal from a decision of the District Court was adjudged insolvent in September last. He was at that time in custody under writ for a Crown debt. The Attorney-General now appeals from an order made at the insolvent's instance, and purporting to be made under section 36 of the Ordinance, directing him to be released from custody. I think that the order was wrongly made, the insolvent not having thought proper to surrender in the insolvency case within the meaning of section 36. That section makes express provision for the surrender of insolvents who are already in custody, but this respondent has not availed himself of that provision. The order must be set aside and the appellant will have his costs.

DIAS, J., concurred.

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Present:—CLARENCE, A.C. J., and DIAS, J.

(*December* 18, 1890, *and January* 23, 1891.)

D.C., Ratnapura, No. 3,753. } SIRIBOHAMY v. RATTARANHAMY.

Usufructuary mortgage—Action to redeem—Right of heirs of mortgagor to sue without administration—Tattumaru possession—Tender.

Any one of the heirs of a deceased mortgagor, who have inherited the mortgaged property, can maintain an action to redeem without letters of administration to the estate of the mortgagor.

Where a mortgage is one with possession in lieu of interest ;—

Held that the mortgagee is entitled to have his interest in the form of crops ; and if the mortgagor wishes to redeem at any point of time which would deprive him of his interest in that form, the mortgagor must compensate him in money.

Held, that therefore the mortgagor cannot compel the mortgagee to redeliver possession by merely tendering the principal amount of the mortgage at a time when the mortgaged property is under crop, or, in the case of a mortgage of a share of a field cultivated in *tattumaru*, when it is the mortgagee's turn to cultivate.

This was an action by the plaintiff to redeem two mortgages, one made by himself and his deceased father and the other by the father alone, with possession in lieu of interest. The plaintiff alleged a tender of the principal amount of the mortgages in March, 1890, and a refusal to accept on the part of the defendant, and the plaintiff brought the amount into Court and prayed for a redemption of the mortgages.

The defendant demurred on the ground that the libel did not aver that the plaintiff had obtained letters of administration to his deceased father's estate or that the estate was a small one and did not require administration. The defendant also pleaded that there were certain other heirs of the deceased mortgagor who have not been made parties to the action. The defendant further denied the alleged tender and proceeded to plead that the lands in question were possessed in *tattumaru* and that the period commencing February, 1890, and ending February, 1891, was his term of possession, and that he was therefore entitled to retain possession till the end of that period.

The replication *inter alia* denied that the lands were possessed in *tattumaru*, and averred that they were possessed "by the co-sharers jointly every year".

The District Judge (L. W. Booth, overruled the objection as to the non-joinder of the other heirs of the deceased mortgagor, and received evidence as to the value of the estate of the mortgagor, and holding upon that evidence that the estate did not require administration proceeded to try the other issues in the case. The evidence disclosed that the mortgaged property was a share of field and a share of owita and other lands. The District Judge found as a fact that a tender was made as alleged by plaintiff, but that the tender included not only the amount of the mortgages but also certain other money due by plaintiff to defendant, and he held that the tender was bad inasmuch as the money due on the mortgages was not separately tendered. He also held that the lands "have been possessed in *tattumaru*, that the present year [1890] is defendant's turn of possession, and that the Walaowita [one of the mortgaged lands] is now under cultivation by defendant", and that the defendant could not therefore be compelled to accept the money deposited in Court.

the plaintiff's action was accordingly dismissed, and he appealed.

Morgan for plaintiff appellant.

Browne for defendant respondent.

Cur. adv. vult.

On January 23, 1891, the following judgments were delivered :—

CLARENCE, A. C. J.—This is a suit to redeem two mortgages: one made by plaintiff and his deceased father, and one by the father alone, in favour of defendant. Both are usufructuary mortgages, with possession in lieu of interest.

Defendant has sought to raise the objection that without letters of administration to the estate of the deceased mortgagor plaiutiff cannot maintain a suit to redeem. That is not so. Any one of the heirs who have inherited a mortgaged property can redeem, as under English Law one of several joint tenants, or tenants in common, can redeem; and *a fortiori* plaintiff can insist on redeeming the mortgage made jointly by himself and his father.

There are further questions raised, as to the terms on which plaintiff can redeem, and whether a tender was made, before action brought, of the amount due.

Where the mortgage is an usufructuary one, and the mortgagee gets his interest in kind, in the shape of crops, the terms of redemption have to be adjusted accordingly. The mortgagee must either be allowed to take his crop before being redeemed, or must be compensated in money. *A fortiori* if the mortgaged property is a share possessed in *tattumaru*, it would be unfair to the mortgagee if he could be forced to accept his bare principal just before his *tattumaru* turn arrived.

In the present case, it is not as yet ascertained with regard to the mortgages in question how the matter stands in this respect. There are two mortgages to be redeemed; and, so far as I understand the evidence, for we have not the mortgage deed before us, each mortgages a half share of land—one a share of kumbure, and the other a share of owita and other lands.

Again, there is the question as to the condition of the lands when plaintiffs' alleged tender was made. Plaintiff alleges that he repeated his tender when "the field" was in stubble after crop. This may or may not refer to the kumbure only. Further on in his evidence plaintiff says that one of the lands mortgaged, Walaowita, was at the time of the hearing under a crop, as yet unreaped, sown by defendant in January, *i. e.*, the date before plaintiff's alleged tender. All that we need say at present is, that the plaintiff has not made out his contention that in March last he was entitled to redeem on payment of the bare principal.

As to the alleged tender, the fact of which is in dispute, the plaintiff's tender, if made, would not be a bad tender merely because plaintiff at the same time made a separate tender of money due on some other account. We need not, however, go into this matter as the case stands. At present, it is uncertain how much the mortgagee was entitled to demand.

The District Judge has dismissed plaintiff's suit with costs. The plaintiff is entitled to redeem, but the terms on which he should redeem have to be ascertained. The better case will be to set aside the judgment, declare that plaintiff is entitled to redeem, and send the case back to the District Court for inquiry as to the terms on which the redemption is to be worked out. The main principle on which this matter must be adjusted is, that the mortgagee is entitled to have his interest in the form of crops; and if plaintiff wishes to redeem him at any point of time which would deprive him of his interest in that form, he must compensate him in money. Probably the simplest course will be to time the redemption at a time when the mortgagee has had his profits.

As to costs, a mortgagee is in general entitled to his costs of a suit to redeem, excepting of course costs arising out of some improper claim or defence on his part. The order upon this appeal will be :—

Declare that plaintiff is entitled to redeem the two mortgages mentioned in the libel and answer.

Let inquiry be made as to the terms upon which plaintiff is entitled to redeem.

Plaintiff will pay defendant's costs of the hearing on August 26, and of this appeal.

All other costs left as costs in the cause.

DIAS, J.—I am of the same opinion, and think that the plaintiff is entitled to redeem the mortgages, but he cannot be allowed to do that so as to prejudice the defendant's right of possession in lieu of the interest on the debt. If the property mortgaged was under a crop raised by the defendant, or any other person acting on his behalf, the plaintiff cannot redeem till the crop is gathered and removed; and in the same manner, if the mortgaged property was subject to *tattumaru* turn, the plaintiff cannot redeem so as to defeat the defendant's right to enjoy the plaintiff's *tattumaru* turn. I think the case should go back for further proceedings on the above point, and I agree with the Chief Justice on the question of costs.

Present:—CLARENCE, J.

(January 23 and 27, 1890.)

P. C., Galle, No. 10,895. } SILVA v. ROMANIS.

Criminal procedure—Plea of guilty—Jurisdiction—Appeal—Sentence—Criminal Procedure Code, sec. 403.

A plea of guilty admits the jurisdiction of the Court, and therefore in an appeal from a conviction upon such a plea no objection to jurisdiction can be entertained.

Notwithstanding the provisions of sec. 403 of the Criminal Procedure Code, an accused person who has pleaded guilty can raise by appeal the question whether any sentence can legally pass under the charge to which he pleaded guilty.

Where the defendant pleaded guilty to an information charging him under sec. 219 of the Penal Code with having escaped from custody after being arrested "as a road defaulter", and the Magistrate convicted him under the said section of having escaped from custody in which he was detained "for an offence with which he was charged";—

Held, that the conviction varied from the charge to which the defendant pleaded, and was therefore bad.

The complaint made against the defendant was to the effect that he was arrested by the complainant "as a road defaulter" under a certain warrant, and that the defendant "while in lawful custody made his escape, and did thereby commit an offence punishable under sec. 219 of the Penal Code".

To this the defendant pleaded guilty, and the Magistrate proceeded to convict him of "escaping from custody in which he was lawfully detained for an offence of which he was charged, punishable under sec. 219 of the Penal Code", and sentenced him to rigorous imprisonment for two months. The defendant appealed.

The punishment provided in sec. 219 of the Penal Code is imprisonment extending to two years, or fine, or both. The defendant in his appeal took objection to the jurisdiction of the Police Court.

Seneviratne for defendant appellant.

Cur. adv. vult.

On January 27, 1890, the following judgment was delivered:—

CLARENCE, J.—I am obliged to set aside this sentence and to quash the conviction.

The conviction purports to be a conviction upon appellant's plea of guilty. That plea admitted the jurisdiction of the Police Court; so that I cannot uphold the objection to the jurisdiction.

But the conviction entered by the Magistrate varies from the charge to which appellant pleaded. The Magistrate convicts appellant of "escaping from custody in which he was lawfully detained for an offence with which he was charged, punishable under sec. 219 of the Penal Code".

But the information to which defendant pleaded guilty charged him only with escaping from custody after being "arrested as a road defaulter". It did not aver that he was in custody for any offence.

Sec. 403 of the Criminal Procedure Code precludes appellant from going behind his plea; but in my opinion he can raise by appeal the question whether any sentence can legally pass under the information to which he pleaded.

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Present:—CLARENCE, A. C. J., and DIAS, J.

(January 30 and February 6, 1891.)

D. C., Negombo, No. 15,395. } FERNANDO and others v. PERERA and others.

Procedure—Action for land—Death of one plaintiff—Surviving plaintiffs sole heirs of deceased plaintiff—Continuation of suit—Administration—Civil Procedure Code, secs. 547, 392, *&* 394.

In an action for land by several plaintiffs, where the 1st plaintiff died intestate *pendente lite,* and the surviving plaintiffs, who were sole heirs of the deceased plaintiff, became between them the owners of the entirety of the land which was the subject matter of the action;—

Held, that the action did not necessarily abate by the death of the 1st plaintiff, nor was it necessary to have an administrator appointed to the estate of the deceased plaintiff, and join him as party plaintiff, but that the surviving plaintiffs could continue the suit, not as suing on behalf of the deceased plaintiff or his estate, but on their own account for recovering property which was entirely their own.

This was an action in ejectment, originally instituted by nine plaintiffs, the first of whom was father of the rest. The 1st plaintiff died during the pendency of the action, and in a previous appeal the Supreme Court, on 19th June, 1890, upon the authority of the cases reported in Vand. Rep. 96, 2 S. C. C. 63 and 5 S. C. C. 90, ordered that the suit should abate, and that the case should be taken off the roll until the legal representatives of the deceased plaintiff be made parties.

Thereupon, on July 30, 1890, the surviving plaintiffs submitted an affidavit stating *inter alia* that the 1st plaintiff was their father, and died intestate leaving them as his sole heirs, and that they on his death "succeeded him in the possession of all his property, estate, and effects", and upon this affidavit they obtained a rule on the defendants to shew cause "why the surviving plaintiffs should not be made plaintiffs on the record as sole heirs of the deceased 1st plain-

tiff, and why the libel should not be amended on the lines suggested by the Supreme Court".

At the discussion of the rule on September 2, 1890, the defendants objected that letters of administration should be taken out to the estate of the deceased plaintiff as the value of his estate was over Rs. 1,000. The District Judge upheld this objection, and discharged the rule, whereupon the plaintiffs appealed.

Dornhorst for appellants.

Cur. adv. vult.

On February 2, 1891, the following judgments were delivered :—

CLARENCE, A.C.J.—This action was instituted in 1887, and unfortunately this is the third appeal on matters of procedure, the merits of the contest disclosed being as yet untouched. The suit is a suit to recover possession of land of which the plaintiffs alleged that the defendants had dispossessed them. About a year ago the 1st plaintiff, father of several of the other plaintiffs, died, and it appears not to be disputed that those other plaintiffs are his only heirs. This latter circumstance seems to have been overlooked by the learned Judge who made order on the last appeal.

The present appeal is from a refusal of an application made by the surviving plaintiffs, an application which is not very clearly framed, but the object of which was to obtain permission to continue the suit on the ground that the whole interest of the late 1st plaintiff is now represented by persons already parties plaintiff. The matter was discussed in the Court below as though it turned only on the question, whether sec. 547 of the Procedure Code has retrospective operation. I do not think, however, that that question arises. If we are to regard the suit, since 1st plaintiff's death, as a suit on behalf *inter alia* of his estate, then the suit is not maintainable without administration, whether sec. 547 be retrospective or not. For before the Code no action was maintainable to recover property of the estate of a deceased intestate save by an administrator, excepting in cases where the estate was too small to need letters of administration; and all that sec. 547 has done is to fix the limit at Rs. 1,000. The burden of bringing an estate under that exception lies on the party suing; and in this case the party plaintiffs have not so done, for all we know of the extent of the estate is that it is over Rs. 1,000.

But there is another way of viewing the matter. This is a suit to recover land. There were nine plaintiffs : one is now dead, and the surviving plaintiffs comprise between them all his heirs. I am of opinion that under the circumstances the surviving heirs may be allowed to continue the suit on their own account, not as suing on behalf of the deceased plaintiff or his estate, but as suing to recover property which, if their suit be good on its merits, is theirs. Under secs. 392 and 394 of the Procedure Code, if those sections apply, they have a right so to continue the case, and without entering upon any technical discussion as to the retrospective operation of those sections I think that under the peculiar circumstances of the case this will be a proper order to make.

Set aside the order appealed against, and declare that the 2nd, 3rd, 5th, 7th, 8th, and 9th plaintiffs, being the sole heirs of the late 1st plaintiff, the surviving plaintiffs are entitled to continue the suit. No costs in either Court.

DIAS, J.—All the parties interested in the property in question are now before the Court, and I do not see why the case should not be proceeded with.

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Present:—BURNSIDE, C. J.

(June 8 and 15, 1887.)

P. C., Balapitiya, No. 3,391. } SILVA v. RAJELIS.

Criminal procedure—Charge of retaining stolen property—Acquittal of defendant—Restoration of stolen property—Jurisdiction—Appeal—Criminal Procedure Code, sec. 478.

Sec. 478 of the Criminal Procedure Code enacts: "When an inquiry or trial in any criminal court is concluded, the court may make such order as it thinks fit for the disposal of any document or other property produced before it, regarding which any offence appears to have been committed, or which has been used for the commision of any offence."

Where a person was charged with dishonestly retaining stolen property, knowing it to have been stolen, under sec. 394 of the Penal Code, and the Police Magistrate found as a fact that the property (which was produced before the Court) was the property of the complainant and had been stolen, but acquitted the defendant of the charge against him ;—

Held, that, in view of the finding of the Magistrate that the property, the subject matter of the prosecution, was the property of the complainant and had been stolen, the Police Magistrate had power, under sec. 478 of the Criminal Procedure Code, to direct the restoration of the property to the complainant, notwithstanding the acquittal of the defendant upon the charge made against him.

The defendant was charged with having dishonestly retained a stolen bull, the property of the complainant, knowing it to have been stolen. The bull was produced before the Court at the trial. The Magistrate, upon evidence heard, found that the bull belonged to complainant, and had been stolen from him, but he acquitted the defendant, holding that he had not dishonestly retained it with guilty knowledge, but had innocently

purchased it from a third party. He also made order that the bull should be restored to the complainant. Against this latter order the defendant appealed.

Dornhorst for defendant appellant.

Cur. adv. vult.

On June 15, 1887, the following judgment was was delivered :—

BURNSIDE, C. J.—This petition is properly before the Court, as the Police Magistrate improperly rejected it when it was put in in time.

I have examined the authorities on the Indian Code, and they support the right of a magistrate to order the restoration of property produced before him if he is of opinion that an offence has been committed with regard to it.

This is an exception which it appears the Code has engrafted upon the general principle of law, that when there has been an enquiry or trial, and the accused is discharged or acquitted by any criminal court, that court is bound to restore the property into the possession of the person from whom it was taken. (See *in re Annapuranabi* I. L. R., 1 Bombay 630, and the cases referred to in Agnew and Henderson's Criminal Procedure Code p. 374.)

In the present case the bull, the subject of the prosecution, was produced before the Magistrate; and although he acquitted the accused of dishonestly retaining it knowing it to have been stolen, he found that it had been stolen from the prosecutor, and ordered it to be restored to him.

It was against this order that the accused appealed. The order will be affirmed.

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Present:—CLARENCE and DIAS, JJ.

(December 20, 1889, *and January* 17, 1890.*)*

D. C., Puttalam, No. 260. } MOHAMADALY MARIKAR v. ASSEN NAINA MARIKAR.

"Bond"—Construction—Promissory note—Prescription—Ordinance No. 22 *of* 1871, *secs.* 6 *&* 7.

The plaintiff declared upon an instrument which, after acknowledging indebtedness in a certain sum of money, contained a promise to pay the same within six months from the date thereof, and stipulated that in default of payment within that period the amount should be recovered with interest at a certain rate. The instrument was in the body of it called "bond", "debt bond", "debt bond of obligation", &c., and professed to make a general mortgage of the debtor's property. It bore a stamp sufficient to cover a bond of the amount in question.

Held, that the above instrument was not a "bond" within the meaning of sec. 6 of the Prescription Ordinance, and that an action thereon would be prescribed, in six years, under sec. 7 of the Ordinance.

The instrument sued upon was dated February 1, 1879; and the action was instituted on March 1, 1889, the libel averring failure of payment of any part of the principle or interest. The terms of the instrument, which was in the Tamil language, were as follows:—

"To Abdul Hassis Magudu Naina Marikar, Headmoorman of Puttalam, I Alliar Marikar Assen Naina Marikar of the aforesaid place have written and granted the debt bond of obligation, the purport of which is as follows, to wit:

"That on account of the amount which I have received from the aforesaid person for paying the amount due upon the writ issued from the respectful District Court of Chilaw in case No. 23,993, which was instituted against me by Ahamadu Naina Marikar Ibrahim, Notary of Puttalam, and another, and on account of the amount now received from the aforesaid person in consequence of my necessity, a sum of Rs. 400 is due by me: and whereas I have received the said sum of Rs. 400 cash in full, I shall within a term of six months from the date hereof pay the said principal, and redeem this debt bond, but should I fail to pay the money within the period specified the creditor or his heirs or administrators may sue me or my heirs or administrators as they like for the said principal together with interest thereon at the rate of one per cent. per mensem from this day, and recover the principal and interest so accumulated on all kinds of property belonging to me, and besides, except the payment of the principal and interest endorsed on this bond in small sums, I shall not produce any receipts or other evidence alleging payment in small sums.

"Thus being bound I have granted this bond, and set my signature to the knowledge of two witnesses.

[Two signatures.] [Signature.]

"I Segu Naina Wapu Markar have drawn the above debt bond by affixing to it adhesive stamps of one rupee and five cents."

[Signature.]

The defendant pleaded that the cause of action did not arise within six years of action brought.

The District Judge held that the instrument was a promissory note, and that the action not having been brought within six years was prescribed under sec. 7 of the Ordinance No. 22 of 1871, and dismissed the action. The plaintiff thereupon appealed.

Wendt, for plaintiff appellant, cited *C. R. Batticaloa* 16,209, Wendt's Rep. 297.

Sampayo for defendant respondent,

Cur. adv. vult.

On January 17, 1890, the following judgments were delivered :—

CLARENCE, J.—This appeal raises a question, which, on various previous occasions, has given this Court much trouble, viz., whether an instrument declared on is to be regarded as a "bond" within the meaning of the Prescription Ordinance. If the instrument now declared on is to be regarded as a "bond", the plaintiff's action is in time; if otherwise, the action is prescribed.

In the case reported Wendt 296 this Court had occasion to point out the impossibility of reasonably applying the English law term in a country where instruments under seal possess no special attribute. The instrument now declared on describes itself by three different terms, of which கடன்சிட்டு * is one. In effect it is a simple admission of indebtedness and promise to pay. I do not see how it can be regarded as a "bond"; and so far as concerns the intention of the parties who made it, as evidenced by the stamps affixed, the stamps are consistent with its being either a bond or an agreement. In my opinion the judgment appealed from should be affirmed.

DIAS, J.—Judging from the translation of the instrument, it amounts to nothing more than an acknowledgment of a debt with a promise to pay. The words "bond" and "obligation" which appear in several parts of the document cannot alter its nature. I do not think we ought to interfere.

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Present:—CLARENCE, A. C. J., and DIAS, J.

(February 20 *and* 24, 1891.*)*

D. C., Matara (Testamentary) No. 768. — In the matter of the last Will and Testament of APPUHENNEDIGEY BABAN.

Testamentary procedure—"Final account"—Distribution of the estate—Petition by legatee for payment of distributive share—Administration suit—Practice—Jurisdiction—Civil Procedure Code, sec. 720.

In 1882 the executor filed an account, which purported to be a final account, but which showed that there were still assets in the executor's hands. In a certain proceeding the District Judge, in March, 1889, minuted an order that the account filed was thereby passed and the estate closed. In September, 1890, a legatee petitioned under sec. 720 of the Civil Procedure Code praying for an account and payment of the distributive share due to him.

Held, that notwithstanding what purported to be a final account and the minute of the District Judge of March, 1889, the estate not being wholly distributed, the testamentary proceedings were still open and would properly be continued under the Civil Procedure Code.

Held, that the Court had jurisdiction to entertain the application under sec. 720 of the Code for payment of the distributive share due to the petitioner, and that it was not necessary to institute a separate administration suit for that purpose.

The executors having in July, 1879, obtained probate of the will, administered the estate, and on November 21, 1882, purported to file a "final account", which, however, showed that there were assets in their hands undistributed, and there were also subsequent proceedings indicating that the estate was not wholly distributed. In March, 1889, the District Judge recorded: "the final account affirmed to on 21st November, 1882, and filed by the executors is hereby passed and the estate closed." On 26th September, 1890, the appellant, a legatee under the will, filed a petition stating that the executors had distributed the moveable property but that certain immoveable property had been sold by them for the purpose of distribution, and that after deducting certain payments to him and also value of property bought by himself there was still a balance of the Rs. 12,191·26 of which he was entitled to a certain share, and he prayed that the surviving executor (one of them having died in the meantime) be ordered "to render an account of his proceedings and to make over to the petitioner his distributive share".

Upon this petition the appellant obtained a citation upon the executor under sec. 720 of the Civil Procedure Code. In showing cause the executor objected to the procedure adopted on the grounds that the estate had been closed in 1882, that the Civil Procedure Code did not apply in such a case, and that the appellant's remedy, if any, was by separate action. The executor, however, admitted upon examination that the appellant was entitled to the share claimed,

The District Judge upheld the objection to the procedure, holding that the final account "having been passed and the estate closed", there was "no case pending before this Court in regard to the administration of the estate in question, which can be continued under the provisions of the Civil Procedure Code". The citation was thereupon discharged with costs, and the petitioner appealed.

vanLangenberg for appellant. The so-called final account shows assets still in the hands of the executor. The proceedings indicate that the estate has not yet been completely distributed, and the executor in fact admits the petitioner's claim but merely objects to the procedure. It is submitted that the procedure under the Code applies. Sec. 3 provides for "every action, suit, or other matter", pending at the time of the Code coming into operation, being continued and proceeded with under its provisions. The estate not having been wholly distributed, this matter is stil pending. No separate action is necessary, sec. 720 of the Code being specially intended to dispense with costly administration suits.

Cur. adv. vult.

The following judgment was delivered on February 24, 1891:—

CLARENCE, A. C. J.—This is an application by petition under sec. 720 of the Procedure Code, petitioner claiming to be entitled to a distributive share of the estate of one Appuhennedigey Baban, who died in 1877.

* i. e., *kadan chittu.*—ED.

The District Judge dismissed the application, being of opinion that by reason of the executor's "final account having been passed, and the case closed", there is no matter now pending in the District Court in which an order under sec. 720 can be made, and the petitioner appeals.

The will was proved shortly after the testator's death. In 1882 an account, set up as a final account, was filed. No settlement or closing of the distribution was however made at that time; and in 1883, after various and sundry more or less confused proceedings in the matter, this Court in appeal pointed out that, without having the accounts of the parties entitled ascertained as under an administration decree, a certain order which the District Court had made directing the executors to bring to Court a sum of Rs. 12,000 could not be supported, and this Court took occasion to point out that the executors must, as the matter then stood, administer the estate on their own responsibility without the interference of the District Court. After this one of the executors seem to have died, and for some years sundry journal entries occur in the Paper Book of the testamentary proceedings indicative that the distribution of the testator's estate was still incomplete. At length, in March, 1889, the District Judge minuted the following order:—

"Case No. 34,049 of this Court instituted as per order of 22nd March, 1883, having been struck off as dormant, the final account affirmed to on the 21st November, 1882, and filed by the executors, is hereby passed and the estate closed."

The case No. 34,049 here referred to would seem to have been some suit instituted on the suggestion of the then District Judge by an heir or heirs of the testator against the executors.

I think that the District Judge's reasons for rejecting the petitioner's application *in limine* cannot be upheld. I do not think that the operation of sec. 720 is restricted to matters in which the right to a distributive share of an estate originated after the Code came into operation. In my opinion all that is necessary to found the jurisdiction under sec. 720 is simply the *factum* of an estate not wholly distributed. I cannot infer that the estate now in question has been wholly distributed merely from the minute of March, 1889, just quoted. The account filed in 1889 may or may not have been a correct account in disclosing all the assets, but the question remains whether the petitioner has received his share. His petition is not very clear in its averments, but this may be cleared hereafter. The executor, admitting that petitioner was originally entitled to the fractional share stated in the petition, has resisted the application on the technical ground that the special procedure provided by the Code does not apply, and that petitioner's only remedy is by an administration suit. There, in my opinion, the executor was wrong, and the matter of petitioner's application must go back to the District Court to be dealt with in due course. It would be premature now to say anything as to the procedure to be adopted under sec. 720. The order of the District Court must be set aside; and the executor having failed in his technical objection, must pay petitioner the costs of this appeal.

DIAS, J., concurred.

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Present:—CLARENCE, A. C. J.

(January 16 and February 6, 1891.)

P. C., Batticaloa, No. 5,246. } CURRAY v. THAMPAN.

Toddy—"Licensed retail dealer"—Drawing toddy—Authority to license—"Tavern-keeper"—Ordinance No. 10 of 1844, secs. 26, 39, & 40.

Where the Government Agent, acting under sec. 26 of the Ordinance No. 10 of 1844, licensed K., or on his behalf B., to sell arrack, rum, and toddy by retail at a certain place,—

Held, that B. was a licensed retail dealer within the meaning of the Ordinance No. 10 of 1844, and had authority lawfully to issue a licence to any person to draw toddy under the provisions of the Ordinance.

Held, further, that a "tavern-keeper", *i. e.,* an employe who presides behind the bar of a tavern and dispenses liquor to customers, does not require a licence in order to enable him to sell arrack, rum, and toddy by retail.

The defendant was charged with drawing toddy without a licence. But at the trial a licence was produced which had been granted by one Bastianpillai. The Magistrate convicted the defendant, who thereupon appealed.

There was no appearance of counsel in appeal.

On February 6, 1891, the following judgment was delivered:—

CLARENCE, A. C. J.—I should have wished in this case to have had the assistance of an argument.

The question on this appeal is, whether the defendant in drawing toddy was justified by the licence produced, granted by the witness Bastianpillai. Sec. 40 of the Ordinance provides that toddy may be lawfully drawn by a person who has obtained a licence to draw from "the licensed retail dealer in toddy of the district" in which the palm is situate. The question then is, whether Bastianpillai is such a licensed retail dealer.

Bastianpillai purported to act under a retailer's licence granted by the Government Agent and couched

in these terms :—"I * * * Government Agent * * do hereby license Kasinader Vaitalingam, or on his behalf Bastianpillai and Paulupillai, to sell arrack, rum, and toddy by retail * * * at the tavern No. 25, situate at," &c. The Magistrate has convicted defendant, holding that Bastianpillai is only a "tavern-keeper" and not "a licensed retail dealer", and that he had therefore no power to give a licence to draw toddy. I suppose that by "tavern-keeper" is meant an employe who presides behind the bar of a tavern and dispenses liquor to customers. There is no necessity under the Ordinance of a licence to such a person in order to enable him to sell toddy. His sales, under sec. 26 of the Ordinance, are covered by the licence of his employer. He is a person "acting for and by the authority, and for the benefit of, and in conformity with the licence granted to such retail dealer". I cannot pretend to say why the names of Bastianpillai and Paulupillai were inserted in the licence already quoted ; at any rate I cannot say that they are not licensed retail dealers within the meaning of sec. 40 merely because they are licensed to sell by retail on behalf of Vaitalingam. So far as I can see, the Government Agent may have travelled out of his functions in purporting to record in this licence that Bastianpillai's dealings were to be "on hehalf" of Vaitalingam. Bastianpillai is however licensed to sell toddy by retail. If he was to be a mere barman, and not invested with the powers of a "licensed retail dealer", there was no necessity to license him at all. I cannot hold that although he has a licence to retail he is not a licensed retail dealer.

Conviction set aside, and defendant acquitted.

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Present :—DIAS, J.

(February 2 and 13, 1891.)

P. C., Badulla, No. 6,986. } RAMLAN v. CADER MEEDIN.

Criminal procedure—Charge—Complaint or information—Ordinance No. 22 of 1890.

Ordinance No. 22 of 1890 substitutes a new chapter for chap. xix. of the Criminal Procedure Code.

Sec. 226 of the substituted chapter enacts as follows .—

(1) A Police Magistrate may convict an accused of any offence over which a Police Court has summary jurisdiction, which, from the facts admitted or proved, he appears to have committed, whatever may be the nature of the complaint or information.

(2) The Police Magistrate, before he so convicts an accused as aforesaid, shall frame a charge in writing, and shall read and explain the same to the accused; and such of the provisions of chap. xviii. as relate to altered charges shall apply to a charge framed under this section.

Held, that since the Ordinance No. 22 of 1890 a formal charge need be framed in a summary case, only where the Police Magistrate convicts the accused person of an offence other than that disclosed in the complaint or information.

The information in this case was dated December 19, 1890, and ran as follows:—

"That the defendant abovenamed did on the 19th day of December, 1890, at Vidurupola, within the jurisdiction of this Court, dishonestly retain in his possession stolen property having reason to believe the same to be stolen property, to wit, 6 measures of green and ripe coffee of the value of Rs. 1·50, and thereby committed an offence punishable under sec. 368 of the Ceylon Penal Code, and sec. 2 of the Ordinance No. 22 of 1886."

On the day of trial the Police Magistrate explained the above complaint to the defendant, who stated that he had cause to shew against conviction. The Magistrate then proceeded to hear the evidence, at the conclusion of which he convicted the defendant, but no formal charge was framed by him, and no plea was taken. The defendant thereupon appealed.

Wendt for defendant appellant. The conviction is bad, inasmuch as no charge has been framed or plea taken.

[*Layard, S. G.*, as *amicus curiæ*, referred to the Ordinance No. 22 of 1890, which he said made an alteration of the procedure under the Criminal Procedure Code. Under the substituted chap. xix. the framing of a charge by the Magistrate is dispensed with, unless he convicts the accused person of an offence not disclosed in the complaint or information.]

Wendt contended that the new Ordinance made no alteration in the law as to the necessity of a charge. Sub-sec. 1 of sec. 226 of the substituted chapter is identical with sec. 235 of the Criminal Procedure Code, and sub-sec. 2 requires the Magistrate to frame a charge. The distinction referred to by the Solicitor-General does not appear in the Ordinance. If the Legislature intended to draw that distinction, *quod voluit non dixit.* Further, even if such intention can be said to have been effected, the complaint or information must at all events constitute a good charge, which it does not in this case. The offence of dishonestly retaining stolen property is not an offence either under sec. 368 of the Penal Code, or under sec. 2 of Ordinance No. 22 of 1886. The conviction upon the present complaint is therefore bad.

Cur. adv. vult.

On February 13, 1891, the following judgment was delivered :—

DIAS, J.—The accused in this case was charged by the complainant under sec. 368 of the Penal Code and sec. 2 of Ordinance No. 22 of 1886. The matter of

the complaint was read, and explained to the accused, who stated that he had cause to show against conviction. Evidence was adduced on both sides, on which the Police Magistrate gave his judgment and passed sentence. No formal charge was framed, and no plea taken as required under the old procedure. Mr. Wendt, for appellant, objected that the proceedings were irregular for want of a formal charge and plea ; but Mr. Solicitor called my attention to Ordinance No. 22 of 1890, which amended the Criminal Procedure Code in some respects, and substituted a new chapter for chapter XIX. We must therefore now look to Ordinance No. 22 of 1890 as laying down the procedure to be followed in cases of summary trial by Police Courts. Under sec. 219 of the Ordinance no formal charge need be framed in certain cases; but under sec. 226, the Police Magistrate may convict an accused person of any offence over which a Police Court has summary jurisdiction, which, from the facts admitted or proved, the accused appears to have committed, but under sub-sec. 2 the Magistrate is bound to frame a charge. The reason for this distinction is obvious, as in the former case the plaint informs the accused of the nature of the charge against him ; but in the latter case, he has no such information till the charge is framed and explained to him. Now, to come to the matter in hand, there were two charges against the accused, disclosed in the plaint, which were read and explained to him. He was convicted on the second charge, viz., that founded on sec. 2 of Ordinance No 22 of 1886. The procedure adopted by the Police Magistrate was therefore regular, and the conviction and the sentence must be affirmed.

———:o:———

Present:—BURNSIDE, C. J., and CLARENCE & DIAS, JJ.

(February 27 and March 3, 1891.)

The Special Commissioner's Court (Wellawatte) No. 219. } SMITH v. WIJEYRATNE.

Registration of title to land—Money decree against owner of land—Charge upon land—Ordinance No. 5 of 1877, sec. 8—Appeal—Civil Procedure Code, sec. 755.

Ordinance No. 5 of 1877 provides for the registration of title to land, and by sec. 8 enacts that "every person having or claiming to have any right, title, or interest in or to any such lands, whether in possession, reversion, remainder, or expectancy, except as monthly tenant, and whether by way of mortgage, hypothec, lien, charge, or otherwise," shall deliver a statement of his claim in writing, and other sections of the Ordinance provide for the investigation and registration of such claims.

Where a mortgagee of land, having obtained a mortgage judgment upon his bond, sold the mortgaged property, whereby a portion only of the amount of judgment was satisfied, leaving a balance still due upon the judgment, and where the mortgagee sought to register a claim to other lands of the mortgagor in respect of the unsatisfied judgment;—

Held, the mortgaged land having been sold, and the balance amount of the judgment being now due as upon a mere money decree, the judgment creditor has no right, title, or interest within the meaning of the Ordinance in or to any other lands of the mortgagor, and is therefore not entitled to have his claim registered under the Ordinance.

Observations by Burnside, C. J., and Clarence, J., on the question, whether in an appeal from the Special Commissioner's Court a petition of appeal signed and filed by the party himself is regular.

The appellant, Smith, was assignee of a mortgage decree obtained by a third party, upon a bond granted by one Wirakon Arachchi. The land mortgaged by the bond was sold under writ, and realized less than the mortgage judgment, and there was still a balance due on the judgment. After the death of the mortgagor his widow mortgaged certain other land, belonging to the mortgagor, to Wijeyratne, the respondent. Wijeyratne put his bond in suit, and having obtained judgment, had the land mortgaged to him sold under writ, and purchased it himself. Wijeyratne, as owner of this land, claimed to have his title registered before the Court of the Special Commissioner for the registration of titles to land at Wellawatte, in which the land was situated, under the provisions of Ordinance No. 5 of 1877. The appellant Smith also claimed, as against Wijeyratne, to have registered a charge upon this land, as an asset of the estate of the deceased mortgagor Wirakon Arachchi in respect of his unsatisfied judgment. The Special Commissioner rejected the claim of Smith, and he appealed.

Dornhorst for appellant.

Fernando for respondent.

BURNSIDE, C. J.—In my opinion the Commissioner's decree is right, and must be affirmed with costs.

The simple question is, whether the holder of a money judgment can be said to have any right, title, or interest in or to the lands of his debtor within the meaning of sec. 8 of the Land Registration Ordinance of 1877 so as to entitle him to make a claim for registration.

The Commissioner says he is not aware of any law which gives such a claim, and he is certainly right. The right to claim registration is conferred by the section I have quoted. It certainly does not put a judgment creditor in the category, and that, as it seems to me, is all that is needful to say.

I do not favour the contention that sec. 755 of the Civil Procedure Code governs these appeals to the extent contended for, but it is unnecessary to express an opinion on that point.

Clarence, J.—The decision of the Special Commissioner against which appellant desires to appeal is unquestionably right. Put shortly, the case is this: Wijekoon Arachchi, when alive, owned several pieces of land, one of which he mortgaged. The judgment on that mortgage is now vested in appellant. The mortgaged land has been sold under the judgment, and the mortgage is still unsatisfied. Wijekoon's widow executed a mortgage of another plot of Wijekoon's land, and under a judgment on that mortgage this second plot of land was sold to a purchaser. Appellant is now seeking to recover the balance due on his unsatisfied judgment by a sale of the second plot. That is to say, appellant, as an unsecured creditor, having simply a judgment for a sum of money due to him from the estate of the mortgagor, is seeking to recover the amount due to him by following up this second plot of land, as assets of the mortgagor, into the ownership of its purchaser. Appellant has clearly no "right, title or interest", within the meaning of section 8 of Ordinance 5 of 1877, in this second plot, capable of registration under the Ordinance. All that appellant claims is a resort to this land as an asset of his mortgagor for satisfaction of an unsecured debt due to him. That is clearly not a matter for registration under the Ordinance.

The appeal failing on its merits, it might be unnecessary now to say anything on the question, whether the appeal should have been rejected. I think it well, however, in view of what passed upon the argument of the appeal, to say that upon consideration I am disposed to favour respondent's Counsel's objection and to doubt whether the appeal should not have been rejected, on the ground urged by respondent's Counsel, viz. that the appeal petition is signed by the appellant himself and not by an advocate or proctor, and not having been taken down by the "Secretary or Chief Clerk of the Court" as provided in section 755 of the Procedure Code. Section 21 of the Ordinance No. 5 of 1877 declares that, save as regards certain particulars not material to this decision, appeals under that Ordinance shall be dealt with and disposed of in the "same manner and subject to the same rules as appeals from Interlocutory orders of District Courts are dealt with and disposed of". Interlocutory orders of District Courts as well as Final orders are now governed by section 755 of the Procedure Code, and under that section petitions of appeal are required to be drawn and signed by an advocate or proctor, with a saving in favour of appeal petitions taken down by the Chief Clerk or Secretary of Court. I do not know whether the Special Commissioner is endowed with an officer who can be styled Chief Clerk or Secretary, but assuming that he is not, then it may be that appellants are driven to have their appeals drawn and signed by advocates or proctors. The Ordinance merely provides for the claimants appearing personally or by their "agents." As a matter of fact, advocates and proctors, we know, do appear before the Special Commissioner; it would at any rate be quite open to any intending appellant to retain an advocate or proctor for the purpose of the appeal.

In any view, however, the appeal fails, and respondent must have his costs.

Dias, J.—The appellant in this case is the holder of a money judgment against the estate of the mortgagor, or, in other words, he is a simple contract creditor of the estate. He wanted this claim registered under section 8 of Ordinance 5 of 1877 as a right, title or interest in the mortgagor's land. If this right can be registered under the above section, every shopkeeper who has a claim against you for a few rupees may set up a right to have that claim registered as a charge on the landed property of the debtor.

:o:

Present:—Clarence, A. C. J., and Dias, J.

(*January* 23 *and* 30, 1891.)

D. C. Colombo, No. 2681. } Silva v. Gunatillake.

Partition Commissioner—claim for remuneration—amount awarded by Court in partition suit—notice to parties—estoppel—separate action—practice.

The plaintiff was Commissioner appointed to partition certain lands in a partition suit, to which the defendant was a party. Upon motion made by plaintiff in the partition suit, with notice to all parties, the Court awarded a certain sum as plaintiff's commission to be paid by the parties in proportion to their respective shares, there being no opposition to the motion. The plaintiff brought the present action to recover the defendant's share of the amount awarded.

Held, affirming the judgment of the District Court, that the defendant, having notice of the plaintiff's motion and making no opposition, was bound by the order of the Court and that he could not now object to the amount to be paid by him to plaintiff.

But, *held*, that the plaintiff should have proceeded in the partition suit for the recovery of the amount and should not have brought a separate action.

The Supreme Court accordingly disallowed the plaintiff's costs of the action and of the appeal.

The defendant was party plaintiff in two partition suits, Nos. 99402 and 99403 of the District Court of Colombo, in which by consent of parties the plaintiff in this action was appointed Commissioner to partition the lands, and he was also to clear and survey the lands with a view to the partition. The defendant had claimed and was decreed one half of the lands. Subse-

quently the plaintiff moved in the partition suits, with notice to all the parties, that "the Court do award to the commissioner [the amounts in question] being his remuneration for his labour and for the expenses incurred by him in the survey of the property and in and about the partition and the clearing thereof as sanctioned by the Court, and that the same be paid by the plaintiff and defendants in proportion to their respective shares". The motion paper was signed by the proctors of the parties, including the present defendant, as having received notice. On the motion being made the District Judge minuted as follows: "Allowed, no opposition."

Upon the footing of these facts the plaintiff brought the present action, alleging that defendant had not paid his share of the amounts awarded. The defendant among other things denied that the District Court had awarded to plaintiff the sums mentioned, and, admitting the entry of the motion above referred to and the minute of the District Judge thereon, pleaded that the order was "of no force or avail in law" and no right of action accrued thereupon, among other grounds, because the said order was "entered up without due taxation of plaintiff's bills of charges" and "because there is no sum awarded in the said order to be paid by defendant to plaintiff."

The defendant also denied that the plaintiff had done certain of the work for which he had charged, and he proceeded to plead that the sums charged were excessive. He also pleaded that the plaintiff had been employed upon the terms that he should receive only a sum of Rs 100 for all his services and expenses as per certain letter written to defendant by plaintiff.

The plaintiff in his replication stated that he was induced to write the letter referred to by the defendant by certain fraudulent representations.

At the trial the contention of the defendant was confined to the question whether there had been an award amounting to a decree made by the Court in the partition suits. The District Judge held that the defendant had acquiesced in the order allowing the plaintiff's motion in the partition suits and had thereby incurred a debt, which it was competent for the plaintiff to recover in this action, and he accordingly gave judgment for the plaintiff with costs.

The defendant appealed.

Layard, S.G., (*Dornhorst* with him) for the defendant appellant.

Browne for the plaintiff respondent.

Cur. adv. vult.

On January 30, 1891, the following judgments were delivered :—

Clarence, A.C.J.—In this action the plaintiff sues to recover from the defendant two sums amounting to Rs. 574·46 as defendant's half share of two sums of money which plaintiff claims to be due to him as Partition Commissioner.

Defendant was plaintiff in two partition suits, Nos. 99402 and 99403 of the Colombo District Court, in which plaintiff was decreed entitled to a half share of the lands in question, and in each case the present plaintiff was by consent of parties appointed Commissioner to carry out the partition. In one of these suits the plaintiff claims Rs. 950·15 and in the other Rs. 255·90 for fees, costs, and expenses as Commissioner. No deposit appears to have been made by any party to the partition suits at the time when the Commissioner was appointed, and consequently there is no sum of money in Court out of which the Commissioner can be paid, as contemplated in section 10 of the Partition Ordinance. This, however, does not affect the contention between plaintiff and defendant in the present case, which is as to the amounts which the Commissioner should be allowed.

Plaintiff claims that in each of these two partition cases the District Court by special order "awarded" to him the sums which he claims. It is the fact, although defendant has thought proper to deny it in his answer, that the District Court did make order of the kind alleged by plaintiff. In each case the District Court has minuted that plaintiff moved the court to award him the sums which he claims. These motions were made upon notice to the proctors for the defendants, including the present defendant. The District Judge further noted that no opposition was offered to the motion and made order that the applications be allowed.

The defendant in his answer sets up a contention that the plaintiff by a written agreement made with himself before he was appointed agreed to accept a lump sum of Rs. 100 as his remuneration in the matter, and defendant seeks to support this contention by a letter which plaintiff admits addressing to defendant, but asserts that it was obtained from him by misrepresentation. I think it unnecessary to say anything more about this letter, save that it is discreditable to both parties. So far as its purport is clear, it seems to be that defendant was to use his influence to procure for plaintiff the appointment as Partition Commissioner and that plaintiff should do the work for Rs. 100 only and let defendant pocket the overplus of what the Court might allow, or in other words, that in consideration of defendant obtaining the job for plaintiff, plaintiff

would divide the spoil with defendant. Such an arrangement the Court would not of course support.

Looking at the bills of charges filed by plaintiff in the two partition cases in support of the motion already mentioned, we find considerable charges made which the Court would not, unless by consent, pass without inquiry and production of vouchers. The parties had assented that the Commissioner should be allowed to clear the land in his discretion, in order perhaps to enable him the better to make his surveys and apportionments. In No. 99402 the plaintiff claimed, besides Rs. 172.58 for clearing jungle, Rs. 140 for surveying fees, Rs. 46·66 for partitioning and Rs500 as "commission for appraising". Why the Commissioner should be allowed to claim such sums, more especially the Rs. 500 commission for appraising, is not apparent. It needs not to be said that a Partition Commissioner is in some sense an officer of Court and subject to the control of the Court as to his charges. If this matter came simply before us for consideration of the amounts which ought to be allowed to the plaintiff as Commissioner, the charges disclosed in his two bills would have to be considered and taxed. But it appears that this defendant, by his proctor, consented to the District Court fixing in the two partition suits, as the plaintiff's allowances, the amounts which he claims. The plaintiff's motions to be allowed these sums were made on notice to defendant, and defendant attended by his proctor when the motions came on for discussion and offered no opposition to the motions. The District Judge thereupon noted that he allowed the motions. This was in February 1889, and those orders still stand on the file as orders fixing the amounts which the Commissioner was to be allowed. We cannot now allow the defendant to resile from the consent which he then gave. Defendant offers no explanation whatever in support of his present opposition. He has simply denied, and denied untruly, that the District Court made the orders just described.

Under these circumstances, we cannot say that plaintiff has not made out his claim as against defendant. I see, however, as the matter stands, no reason why plaintiff need have instituted a separate action to claim these sums, and in view of the whole circumstances of the case, while affirming the judgment which the District Court has given plaintiff for the amount claimed, I think that we should allow no costs on either side, in either Court.

Dias, J.—I see no reason to disturb this judgment, except as to costs which I would disallow in both Courts.

Present:—Clarence and Dias, JJ.

(*February* 20 *and March* 3, 1891.)

D. C. Kalutara, No. 67. } Loos and another v. Scharenguivel

Practice—adding parties—Civil Procedure Code, section 18, *and sections* 640 *and* 648.

The procedure under section 18 of the Civil Procedure Code for adding a party should be that followed in England in applications under Order xvi of the Orders under the Judicature Acts, viz. a party seeking to bring in a third person should obtain *ex parte* an order giving leave to serve a notice on the person whom he desires to bring in, and the question whether such person ought to be joined should be considered and dealt with in his presence and in that of the parties already on the record.

The plaintiffs were mortgagees of certain lands and had sued the mortgagors (one of whom was one F. S. Thomasz) in a separate action and obtained judgment. Upon writ of execution being issued and the mortgaged property being seized, the defendant claimed the same before the Fiscal, basing his claim upon a deed of transfer from F. S. Thomasz of a date subsequent to the mortgage. The plaintiffs thereupon brought this action against the defendant for the purpose of having his claim set aside and the property sold.

After summons served, the defendant filed answer alleging his purchase from F. S. Thomasz and fraud and misrepresentation on the latter's part, in that the defendant had been induced to purchase upon the representation by F. S. Thomasz that the property was free from incumbrance. At the same time the defendant moved the Court to make F. S. Thomasz an added party in this action. The plaintiffs opposed the motion, which the District Judge (*C. Liesching*) ultimately disallowed. The defendant subsequently renewed his motion "in view of the statutory requirements of section 640 of the Civil Procedure Code" (This section enacts that a mortgagee shall sue the mortgagor as defendant whether such mortgagor is or is not in possession of the property mortgaged at the time of action brought). The District Judge again disallowed the motion, stating that the statutory requirements of section 640 had already been complied with in the mortgage suit brought by the plaintiffs against the mortgagors. From this order the defendant appealed.

Withers for defendant appellant.

Morgan (*H. Loos* with him) for plaintiffs respondent.

Cur. adv. vult.

On January 30, 1891, the following judgments were delivered:—

Clarence, J.—This is a suit to enforce a mortgage, and the defendant is stated in the plaint to be a person who acquired the mortgaged property by purchase from the mortgagor after the mortgage. The libel avers that the plaintiffs have sued the mortgagor in another action, and got judgment and mortgagee's decree in that action. The defendant now wishes to have the mortgagor made an added party in this suit.

This must be taken to be an application under section 18 of the Code, and in my opinion the procedure under such an application should be that followed in England in applications under Order XVI of the Orders under the Judicature Acts, viz., that the defendant seeking to bring in an added party should obtain *ex parte* an order giving leave to serve a notice on the person whom he desires to bring in, after which the question whether such person ought to be joined can be considered and dealt with in the presence of plaintiffs and defendant, and such person, as, for instance, in *Pilley vs. Robinson* L.R. 20 Q.B.D. 155. In the present case the matter has been discussed merely between the defendant and the plaintiff; and the mortgagor, whom the defendant seeks to bring in, has had no say in the matter. I think, therefore, that we should dismiss this appeal with leave to defendant to proceed *de novo* in the manner above indicated. It will be best to leave the merits of the application untouched at present. We may, however, point out that the circumstance, dwelt on by respondents' Counsel, of the mortgagor having already been sued in another suit, is not necessarily an answer to the application. The object of all procedure for bringing in third parties is to obtain adjudication in one suit binding on all three parties. The question, whether, having regard to section 648, plaintiffs were right in instituting a separate action against the defendant under the circumstances, has not at present been discussed.

Order appealed from set aside, and the case sent back to the District Court for further proceedings in due course. No order made at present as to costs, but either party may hereafter move this Court for an order as to costs.

Dias, J.—In this suit the plaintiffs seek to establish as against a third party their right to discuss a land mortgaged to them by two debtors, viz., Thomasz and Cuylenburg. The plaintiffs obtained a mortgage decree against their debtors in another suit, and the defendant in this suit moved to be allowed to make one of those debtors a party to this suit. The matter of the application was discussed as between the plaintiffs and the defendant; and the debtor, Thomasz, who was intended to be added to the suit, had no notice of this motion, though he was the party most interested. The District Judge refused the application, and the defendant appeals. The proposed addition of a third party to the suit was proper, but the defendant did not go to work in the right way. I would set aside the order, and send the case back as suggested by my learned Brother.

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Present:—Dias, J.

(*April* 15, *and May* 27, 1887.)

P. C. Tangalla, No. 2612. } Andris v. Samela.

Mischief—"maiming" cattle—Ceylon Penal Code, section 412—*construction.*

Section 412 of the Penal Code enacts: "whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, ass, mule, buffalo, bull, cow or ox &c., shall be punished with imprisonment &c."

In a charge under the above section of committing mischief by maiming certain cattle, where the proof was that the animals had been cut by the defendant but had all recovered,

Held, that the word "maiming" in the above section meant permanently injuring, and that the facts did not sustain the charge made.

The Police Magistrate convicted the defendant of the charge made against him under the above section, and the defendant appealed.

Wendt for appellant.

Cur. adv. vult.

On May 27, 1887, the following judgment was delivered:—

Dias, J.—The accused was charged under section 412 of the Penal Code with cutting, injuring, and maiming cattle. The words "cutting" and "injuring" do not occur in the Code, and the question is whether the evidence would support a charge for maiming. Judging from the context, I am inclined to think that the word "maim" is used in the sense of permanently injuring the animal maimed. The words are "maiming" or "rendering useless". The evidence is that the accused cut three of the complainant's cattle, but that they have all recovered, so it cannot be said that the injury inflicted by the accused is of a permanent character.

Set aside, and the appellant is discharged.

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Present:—CLARENCE, J.

(February 21 *and March* 17, 1887.*)*

P. C., Badulla, No. 1,921. } CAREY v. DE SILVA.

Cheating—Charge—Obtaining money by a promise—Intention not to carry out promise—Ceylon Penal Code, sec. 398.

A charge of cheating should set out the means by which the cheat has been accomplished.

Under the Penal Code, in a charge of obtaining money by false pretence, the false pretence need not necessarily be as to existing facts, but may include a promise which the party at the time of making it intended to break.

The facts of the case sufficiently appear in the judgment.

Dornhorst for defendant appellant.

Cur. adv. vult.

On March 17, 1887, the following judgment was delivered :—

CLARENCE, J.—Defendant appeals against a conviction on a charge of cheating. I have had the advantage of reading the judgment of the Chief Justice in No. 856, Police Court, Haldummulla*; and I agree with the Chief Justice that a charge of cheating should set out the means by which the cheat has been accomplished. If the cheat charged is a cheat by false pretence, the charge should specify the false pretence.

In the present case the charge originally lodged by the complainant did distinctly specify the false pretence, viz., a pretence that defendant would expend the moneys received in payment of labourers employed on a certain work. The charge framed by the Magistrate does not give so much information ; it has not, however, been suggested that the defendant has been prejudiced by this omission in the formal charge, and I think it clear that defendant has not been so prejudiced. The offence which the evidence is directed to establish is the obtaining of money from Mr. Carey by representing to Mr. Carey that he would expend the money in payment of labourers employed on a certain work which defendant had contracted to execute for Mr. Carey, the defendant then and there not intending to make good that representation.

Under the old Common Law such a charge would have been demurrable, the rule being that to sustain a conviction on a charge of obtaining money by false pretence the false pretence must be a pretence as to existing facts. The Penal Code goes further, and renders it an offence to obtain money by a promise which the maker then and there deliberately intends to break. To sustain such a charge it is not enough to prove that the defendant failed to cary out his promise: it has to be shown that at the time of making the promise he had not the intention which he declared himself to have.

Defendant had contracted to build a bungalow for complainant. For this defendant was to receive Rs. 1,000, payable by instalments. The written agreement says nothing as to the time when these instalments were to be paid, except that the last was to be paid on the completion of the work. The work was to be finished and the bungalow given over to complainant on the 1st December, 1886. All materials were supplied by complainant, except "such articles as coir rope". When defendant threw up the work, leaving it unfinished, he had received in three instalments an amount of Rs. 400, together with rice to the value of Rs. 412 more, making Rs. 812 in all; and I see no reason to doubt that the work done was far below that value. It is certainly proved that defendant obtained at any rate the last of these cash payments from complainant upon the strength of his promise that he would pay his labourers. A point was made in argument that complainant was bound to make the cash advances under the contract, and that, therefore, they cannot be considered as induced by defendant's representation that he would pay his labourers with or out of the money. But the agreement is silent as to the time when any payments were to be made except the last, and in my opinion complainant was not bound to make advances except in so far as he might be reasonably satisfied with the progress of the work. I think that the evidence does prove that complainant made at any rate the last cash payment on the strength of defendant's representation that he would pay his workmen. It is abundantly proved that defendant did not pay the unfortunate carpenters and coolies whom he employed on the work ; indeed, no attempt has been made to prove the contrary, or to meet the overwhelming evidence adduced on this point. But the question remains,—whether defendant, when he made the representation, was without the intention of keeping his word ; for, as defendant's proctor rightly urged, a mere breach of contract is not an offence. We can only judge of defendant's intention by his acts; and, in my opinion, the only inference which can reasonably be drawn from the facts proved by the prosecution which defendant has made no attempt to meet is that defendant never meant to pay the workmen. I have no doubt that his intention was to make all he could for himself, even to the length of appropriating rice issued for the use of the workmen, and to leave the unfortunate workmen in the lurch.

Affirmed.

* 8 *Supreme Courl Circular* 56.—ED.

Present:—BURNSIDE, C. J., and CLARENCE & DIAS, JJ.

(December 16, 1890, *and February* 27 *and March* 11, 1891.*)*

D. C., Colombo, No. 2,160. } CLARKE *v.* HUTSON.

Deed of lease—Breach of covenant—Right of re-entry—"Said"—"Herein contained"—Construction—Pleading.

The plaintiffs, by an indenture of lease, "in consideration of the rents hereinafter reserved, and of the lessee's covenants hereinafter contained", demised certain premises to defendant for a certain term of years. The indenture then stated certain covenants on the part of the lessee for payment of rent, and for repairs, and also certain covenants on the part of the lessors for quiet enjoyment, on the lessee paying the rent "hereinbefore provided", and performing "the conditions and covenants herein contained". The deed then provided that if the rent were not duly paid, "or in case of the breach or non-performance of any of the said covenants and agreements herein on the part of the said lessee contained, then and in any of the said cases" it shall be lawful for the lessors to re-enter and determine the lease. The deed then provided that the insurance on the premises should be paid by the lessors, but that any increased or extra premiums payable for insurance by reason of anything extra hazardous brought into or done in the premises should be paid by the lessee. The deed finally provided for renewal of the lease on certain conditions.

In an action by the lessors against the lessee for re-entry on the ground of non-payment by the lessee of a certain sum paid by the lessors, as increased premiums for insurance, by reason of an extra hazardous thing being brought into the premises.—

Held, (dissentiente CLARENCE J.) that the proviso for re-entry applied only to breaches of covenants that preceded it, and not to the agreement in respect of insurance which followed, and that therefore the plaintiffs' action for re-entry failed.

Held, further, that at most the plaintiffs' remedy was for recovery of the money paid as extra premium for insurance.

The purport of the lease was as follows :—

"That, in consideration of the rents hereinafter reserved and of the lessee's covenants hereinafter contained [the lessors] do hereby demise unto [the lessee] all those premises . . . To hold the same unto the said lessee . . . for and during the term of four years . . . And the said lessee doth hereby covenant . . . that the said lessee will pay or cause to be paid to the said lessors [the rent agreed upon] and shall and will effect [certain repairs and buildings] and the said lessors do hereby....covenant with the said lessee....that they the said lessors....shall and will during the said term pay and satisfy [all taxes] and that the said lessee .. paying the rent hereby reserved in the manner and at the times hereinbefore provided, and performing the conditions and covenants herein contained and on his part to be observed and performed shall and may peaceably and quietly possess and enjoy the said premises without any let eviction hindrance or disturbance: Provided however that if the yearly rent or any part thereof shall be in arrear and unpaid for a period of fifteen days after any of the days whereon the same ought to be paid as aforesaid or in case of the breach or non-performance of any of the said covenants and agreements herein on the part of the said lessee....contained, then and in any of the said cases it shall be lawful for the said lessors....at any time thereafter upon the said premises to re-enter and the same to have again re-possess and enjoy... and thereby determine to demise: Provided also that if the said premises hereby demised or any part thereof have been or shall hereafter be insured by the lessors....against loss damage or destruction by fire the costs and charges of such insurance and the payments of all premiums on the policy or policies of insurance shall be paid and borne by the lessors....but any increase or extra premiums payable for the insurance of the said premises by reason of anything extra hazardous brought into or suffered to be done in the said premises by the said lessee....shall be paid or borne by the said lessee....: Provided also....that if the said lessee ....shall desire to obtain a lease of the said demised premises for a further term of three years ......the lessors....shall ...at the costs and expense of the said lessee execute a lease of the said premises in favour of the said lessee....for the further term of three years," &c.

The plaint, pleading the indenture of lease as part of it, stated that by the deed the plaintiffs covenanted with the defendant *inter alia* that the defendant paying the rent reserved and performing the conditions and covenants therein contained should peaceably possess and enjoy the demised premises, but that it was provided that in case of the breach or non-performance of any of the said covenants and agreements on defendant's part in the indenture contained, it should be lawful for plaintiffs to enter upon the premises and determine the demise. The plaint then set out the proviso as to insurance, and averred that previous to the date of the lease the premises had been insured against fire, the annual premium being Rs. 105, that subsequent to the lease, and the defendant's entry into occupation, the defendant had "brought into and erected in the same engines, boilers, forges, and other material required by him to carry on therein a general engineering trade, and also the business of a steam laundry", which rendered the risk of fire "extra hazardous", by reason of which the plaintiffs were required to pay, and did pay to the Insurance Company, an extra premium of Rs. 135. The plaint then proceeded to allege that the plaintiffs had required the defendant to pay to them the said sum of Rs. 135 paid as extra premium, and that the defendant had refused to do so. The plaintiffs thereupon prayed for a decree declaring them entitled to re-enter, and ejectment of the defendant from the premises.

The defendant demurred on the ground that the plaint did not disclose the plaintiffs' right to pray for re-entry, "the plaint disclosing only a right, if any, to

demand payment of the increased or extra premiums".

The acting District Judge *(J. Grenier)* overruled the demurrer, holding that the forfeiture clause applied not only to the covenants that preceded it, but to all the convenants and agreements mentioned in the lease. The defendant thereupon appealed.

The appeal was first argued before CLARENCE and DIAS, JJ., on December 16, 1890; but their lordships having differed in their opinions, the appeal was re-argued before the Full Court on February 27, 1891.

Dornhorst (*vanLangenberg* with him) for defendant appellant. The demurrer has been rightly taken. The deed of lease is pleaded as part of the libel. Had it been otherwise, the objection raised by the demurrer would have been a mixed question of law and fact at the trial when the deed was tendered in evidence. But now the deed being read into the libel, the point arises as a matter of pleading whether plaintiffs' prayer for re-entry is supportable on the breach alleged. In the first place, there is no agreement in the deed on the lessee's part to insure. Then even if the deed be read as containing a covenant to insure, the proviso for re-entry does not apply to such a covenant. That proviso refers to the "said" covenants, that is to say, to those preceding it, whereas the proviso as to insurance follows it. (*Spencer* v. *Goldwin*, 4 M. & S. 265) A proviso working a forfeiture would be strictly construed. A proviso for insurance is not one of the usual covenants upon which a lease is forfeited, and in this instance the parties must be taken to have intentionally excluded it from such operation. It has been held that an agreement to grant a lease with "the usual covenants" does not justify a clause of forfeiture upon any condition other than the non-payment of rent: *in re Anderton and Milner's Contract*, L. R. 45 C. D. 476; *Hodgkinson* v. *Crowe*, L. R. 10 Ch. App. 622. The plaintiffs' action, if any, should be to recover the money paid as extra premium.

Browne for plaintiffs respondent. The libel is on the face of it good, and the demurrer fails on the question of pleading. Further, it is submitted that the forfeiture clause does apply to the proviso as to insurance. The words are: "the said covenants and agreements herein contained". "Herein contained" means "contained in the whole lease". The word "said" refers not merely to the covenants set out in full before, but to the covenants previously referred to. Now, all the covenants are referred to in the previous part of the deed. The proviso as to insurance is an agreement. (*Woodfall* 312.) The plaintiffs have properly prayed for re-entry, mere money compensation not being a sufficient remedy where there has been wilful negligence to perform the covenant.

Dornhorst in reply.

Cur. adv. vult.

On March 11, 1891, the following judgments were delivered —

BURNSIDE, C. J.—This is an action of ejectment by a lessor against a lessee for breach of condition upon a clause of re-entry contained in the lease. The defendant has demurred, and after much consideration and consulting all the authorities which I could find to bear on the case I have arrived at the conclusion that the demurrer is good and must prevail, and I agree with my brother Dias that the plaintiffs' action should be dismissed with costs.

The simple question is,—does the proviso for re-entry, which gives the right of re-entry on "breach of any of the *said* covenants and agreements *herein* on the part of the said lessee, &c., contained," embrace a subsequent covenant in the lease on the part of the lessee that, the lessors insuring, any increased or extra premiums (of fire insurance) payable for the insurance of the premises by reason of anything extra hazardous brought into or suffered to be done in the premises by the lessee, should be paid or borne by him.

I refer to the contract between the lessors and lessee by the "covenants", by which they are known to English law; and I apply to them the canon of construction, that they are to be construed, like other contracts, according to the intent of the parties to be collected from the words used.

I would premise that it could scarcely be seriously argued that by the latter covenant the lessee had become bound if he carried on a hazardous business to insure: all that the covenant provides (and in fact the libel so treats it) is, that in the event of the lessee carrying on a hazardous trade which entailed on the lessors increased premiums of insurance, then such increase would be paid and borne by the lessee, and it is not necessary to decide to whom it should be paid; but the reasonable inference is that it should be paid to the lessors, who would insure and pay it in the first instance.

I think the plain meaning of the words used in the proviso points to such covenants as preceded it. We must give pregnant words their common sense meaning, and we cannot ignore them altogether; and it seems to me that the word "said" means those covenants which have been already "said". Now, the covenants which precede the proviso have been "said"; and when the proviso was written, that apt word was used to distinguish them from the subsequent ones which had not yet been "said". I am not impressed with the contention that because the

demise contains the following words which precede the proviso for re-entry, "in consideration of, &c., the lessee's covenants hereinafter contained", which admittedly would embrace all the covenants in the lease, that therefore the subsequent words "the said covenants and agreements" must be held to embrace as well all the covenants. There might be some force in the contention if it were admitted that it was usual to give a right of re-entry upon breach of every covenant forming a consideration for the letting. But manifestly this is not so. Provisos of re-entry are necessarily and invariably restricted to particular and definite breaches of covenant, and a covenant to insure especially must be fortified by a direct proviso for re-entry; otherwise a breach of it will not support an entry or ejectment. So that, whilst this subsequent covenant might well form part of the consideration for the lease and be meant to be embraced by the words "hereinafter contained", there would be no reason for inferring an intention to include it in the subsequent words "said covenants" which the proviso of re-entry was only to embrace. Then again in the ordinary way of draughting leases, the proviso for re-entry is usually the last clause, after all the covenants have been detailed, and I cannot reject it as insignificant that in this particular case the proviso for re-entry precedes the covenant to which the plaintiff has sought to apply it.

Then again, looking at the nature of the covenant itself, it could never have been intended to give the extreme remedy of re-entry upon non-payment of a sum of money for the payment of which no definite time has been fixed, and which might never be incurred, and perhaps at most be insignificant, and for which a remedy by action would be ample. The objection to the libel has been well taken on demurrer, and must succeed.

CLARENCE J.—Plaintiffs, the lessors, sue to enforce an alleged provision for entry. Defendant demurs to the plaint, and appeals from an order overruling his demurrer.

The question is,—whether, upon the true construction of the lease, the proviso for re-entry extends to the default with which the lessee is charged, viz., a default in paying certain extra insurance premiums charged on the demised premises by reason of the lessee having erected thereon certain steam machinery and engineering plant.

The lease contains a number of covenants or promises on the part of the lessors and lessee, and then follows the provision for re-entry, which is in these terms: "provided however that if the yearly rent or any part thereof shall be in arrear and unpaid for a period of 15 days after any of the days whereon the same ought to be paid as aforesaid, or in case of the breach or non-performance of any of the said covenants and agreements herein on the part of the said lessee, his heirs, executors, administrators, or assigns, contained, then and in any of the said cases it shall be lawful," &c., and then follows the operative part of the proviso for re-entry. Next after this comes a proviso that the lessors are to pay fire insurance premiums, but that "any increased or extra premiums payable for the insurance of the said premises by reason of anything extra hazardous brought into or suffered to be done in the aforesaid demised premises by the said lessee" shall be paid or borne by the lessee. The plaint avers that defendant has erected within the premises certain engineering machinery, in consequence of which the annual fire insurance premium has been raised by the sum of Rs. 135, and plaintiffs are now claiming to re-enter for a failure on defendant's part to repay plaintiffs the extra premiums so paid by plaintiffs.

It is contended in support of the demurrer that this proviso for re-entry is referable only to the agreements or promises which precede it in the instrument and not to the agreement concerning increased fire insurance which follows it. It was argued for the lessee that "breach of any of the *said* covenants or agreements herein" means "breach of any of the covenants or agreements *hereinbefore contained*". I confess that the lease is not very clearly framed in this matter, but we must if possible give to the words employed their reasonable and grammatical meaning.

The usual way of referring to agreements which have been already written out in an earlier part of the instrument is to describe them as "hereinbefore contained", which is quite accurate. "Said" means something less than "hereinbefore contained", and corresponds rather to "hereinbefore named or indicated". The lease does contain sundry promises which do precede the proviso for re-entry, and are thereinbefore contained, while the agreement as to these extra insurance premiums comes after it. But there is at the beginning of the instrument a general mention of agreements. The demise is expressed to be in consideration of the rents reserved and of "the lessee's covenants herein contained", and further on, just before the re-entry clause, there is an agreement for quiet enjoyment expressed to be in favour of the lessee when "performing the conditions and covenants herein contained". It seems to me a more easy and reasonable construction to refer "said" in the re-entry clause to these general and comprehensive mentions of the promises made on the lessee's part

(for the term "convenant" has no technical import with us) than to give it the construction for which defendant contends.

I think it more reasonable to read "said" as "hereinbefore referred to" than as "hereinbefore contained", and it seems to me that the general intention of the instrument is that the proviso for re-entry should apply to all the lessee's promises.

Some reference was made upon the argument before us to the English authorities bearing upon the question when or how far equity will relieve against a condition for forfeiture or re-entry on breach of a condition. I do not think that any question of that kind arises upon this demurrer. I take it that, although the demurrer be overruled and the libel held a good libel, the question, whether the lessee might be relieved against the re-entry, is a further and another question quite independent of the goodness or badness of the libel. I think that the libel is a good libel. According to the libel, the lease, as I read it, contains a proviso for re-entry on breach by the lessee of a promise to pay the extra insurance premiums, and the libel avers such a breach.

In my opinion the District Judge has taken a correct view of the lease, and the appeal should be dismissed with costs.

Dias, J.—This is an action by lessors against lessee to enforce a covenant of re-entry by reason of a breach of another covenant on the part of the lessee to pay the lessors the extra premiums paid by the lessors for insuring the premises which became necessary by the introduction by the lessee of extra hazardous material into the demised premises. The defendant demurred to the libel, on the ground that the right of re-entry clause did not apply to the plaintiffs' claim for extraordinary insurance. The question turns upon the construction of the lease. After setting out several covenants and agreements as to payment of rent, &c., the lease goes on to say "provided however that if the yearly rent or any part thereof shall be in arrear or unpaid for a period of 15 days after any of the days whereon the same ought to be paid as aforesaid, or in the case of the breach or non-performance of any of the said covenants or agreements herein on the part of the said lessee, his heirs, &c., contained". Then follows a covenant that the ordinary insurance against fire should be paid by the lessors and extraordinary insurance by the lessee. The breach relied on by the plaintiffs is the defendant's refusal to pay the premiums for extraordinary insurance. The question is, whether by such refusal the lessee has forfeited his lease and the lessors have now a right to re-enter and resume possession. It was contended for the appellant that the covenant to re-enter did not affect the covenant, the breach of which is relied on by the plaintiff, but that it only affected such of the covenants and agreements as were antecedently stated, and the words "said covenants and agreements herein" are relied on in support of this contention. The word "said" clearly only refers to the covenants and agreements already referred to, and, in the connection in which the word "herein" is used, it must be taken to mean "hereinbefore". The word "herein", if it stood alone, would no doubt apply to the whole deed and all the covenants in it, but its meaning is limited and qualified by the word "said" and made to apply to the covenants and agreements already mentioned. There is no apparant reason why the forfeiture clause should be limited to some only of the several covenants and agreements in the lease; but when the words of the deed are plain we cannot so construe them as to give effect to the supposed meaning of the parties. I think the demurrer should be upheld and the plaintiffs' libel dismissed with costs.

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Present:—Clarence and Dias, JJ.

(*February* 20 *and March* 10.)

D. C. Galle, No. 55,354. } Bawa v. Mohamado Casim.

Partnership—action for account between partners—parole evidence—Ordinance No. 7 *of* 1840, *section* 21.

In an action between partners for an account of the partnership, whose capital exceeded Rs. 1,000, and which was not formed by any deed of partnership,—

Held (following *D. C. Kandy* 52,568, Vand. Rep. 195) that the prohibition against parole evidence in section 21 of Ordinance No. 7 of 1840 applied only to executory contracts, and that parole evidence was admissible to prove a partnership already dissolved, for the purposes of an action for the settlement of partnership accounts.

D. C. Ratnapura No. 22,47½, 6 S. C. C. 119, commented on.

The libel averred that plaintiffs (two in number) and defendant in or about June 1867 "procured goods to the value of Rs. 4,500, each supplying and contributing a third of the same, and were trading in partnership", that the defendant was manager of the business and had charge of all the monies and account books, that they so traded in a certain house up to the month of April 1889, that in that month the defendant "took and appropriated all the monies belonging to the said firm and the said business stopped and the house is since closed", and that the "said partnership business earned a sum of more than Rs. 30,000 as profits, out of which the plaintiffs are entitled to two-third parts, which amount the defendant has drawn and appropriated". The plaintiffs prayed for a dissolution of the partnership and for an account.

The answer *inter alia* denied that "there was the partnership alleged in the libel between plaintiffs and defendant, or that there was any partnership between plaintiffs and defendant in regard to any goods". The defendant also pleaded prescription.

At the trial the District Judge recorded that it was admitted that "the alleged partnership capital exceeded Rs. 1,000, and that there was no preliminary deed of partnership"; and after hearing counsel on the question of admissibility of parole evidence and on the plea of prescription, the District judge (G. W. Paterson), recorded his opinion that oral evidence was admissible to prove the alleged partnership, and he formally overruled the plea of prescription though he refused to pronounce an opinion on the point without hearing evidence. The defendant appealed from this ruling.

Grenier, A.-G., (*Wendt* with him) for defendant appellant. The plaintiffs' action is founded on the existence of a partnership which the defendant had denied. Therefore the plaintiffs must "establish" it, and this he could not do by parole evidence, it being admitted that the capital exceeded Rs. 1,000. (6 S. C. C. 120). The provisions of the Ordinance No. 7 of 1840 must be strictly applied. The reception of parole evidence in such cases as this would lead to the fraud which the Ordinance was intended to prevent.

Dornhorst for plaintiffs respondents. The prohibition against parole evidence in the Ordinance refers to actions on executory contracts only, such as an action by one person to compel another to act as partner with him, and the provision has been held not to apply to actions of account in regard to a partnership already dissolved (Vand. Rep. 195). The proviso to sub-section 4 of section 21 of the Ordinance expressly provides for the reception of parole evidence in actions for the settlement of accounts between partners. The opinion of the Chief Justice in 6 S. C. C. 120 is not the *ratio decidendi* of that case. As to fraud, it is more likely to arise if every partnership has to be proved by deed.

Cur. adv. vult.

On March 10, 1891, the following judgments were delivered:—

CLARENCE, J.—The plaint is not very clearly framed, but it is sufficient for the present to say that the suit is a suit for an account of an alleged partnership. From the circumstance that the prayer includes a prayer for a dissolution, we may infer that the plaint, though very indistinct, is intended to set up a partnership as yet unterminated.

Defendant by his answer denied the existence of the partnership, and has also pleaded *non accrevit intra tres annos.*

The case came on for trial, when the District Judge noted an admission "that the alleged partnership capital exceeded Rs. 1,000, and that there was no preliminary deed of partnership". No trial took place, and I see no minute of any order against which an appeal can be taken. If the defendant had moved for judgment upon the above admission and upon his plea of prescription, and the District Judge had refused that motion, there would have been an appealable order; but I find no minute of any motion or any order. All that seems to have taken place is, that the District Judge expressed a prospective opinion that oral evidence would be admissible, under Ordinance No. 7 of 1840 section 21, to prove that a partnership had come into existence, and also expressed an opinion that he could not at present say that the plaintiffs' cause of suit was prescribed. Under these circumstances I am of opinion that, there being nothing to appeal against, the appeal must be rejected, appellant paying respondents' costs.

I understand my learned Brother to be of opinion that there is an appealable order, but that the order is right. Since therefore we are agreed that the appeal fails, it is not worth while to delay the proceedings by any reference to the Full Court, and the appeal may therefore stand dismissed with costs.

As the appeal is to be disposed of in this manner, I may as well say that I agree with my learned Brother in considering that we are bound by the decision reported in Vand. 195, and that I consider that case to have been rightly decided.

DIAS, J.—This is an action between partners. The plaintiffs are two of the partners, and the defendant is the third partner. The plaintiffs pray for the dissolution of the partnership and for an account. It is alleged that the partnership commenced in June, 1867, with a capital of Rs. 4,500. There is no deed of partnership, but the parties went on trading together till 1885, when the place of business was removed to another place. The plaintiffs allege that the partnership ended in April, 1889, and that the defendant appropriated all the assets of the firm. The defendant simply denied the partnership.

The case was heard on the 21st of November, 1890, and two questions were discussed, viz.: (1) whether it is competent to plaintiff to prove a partnership by parole, it being admitted that the capital of the partnership exceeded Rs. 1,000; and (2) whether the plaintiffs' claim is prescribed. On the 1st point the District Judge held that parole evidence was admissible, but he left the 2nd point undecided. The only point pressed before us in appeal was the 1st, the Attorney-General contending that parole evidence was inadmissible. The question turns upon the construction of the Ordinance No. 7 of 1840,

section 21, sub-section 4. The last two lines of the sub-section 4 are "or to exclude parole testimony concerning transactions by or the settlement of any accounts between partners". These words have been held by the Collective Court to mean that the prohibition against parole evidence only applied to executory contracts and not to contracts which have been partly executed as this is (See Vanderstraaten's Reports 1871 p. 195). There is an averment in the libel that the partnership terminated in April, 1889, and in the 8th paragraph of the answer the defendant says that the plaintiffs were his salesmen in the shop and the 2nd plaintiff left the shop in 1885, and he dismissed the 1st plaintiff from his service. According to the pleadings, the partnership, or whatever it is, ended before this suit was instituted, though in their libel the plaintiffs prayed for a dissolution of the partnership. The case reported in 6 S. C. C. p. 120 was referred to for the appellant, in which the Chief Justice expressed an opinion unfavourable to the reception of parole evidence in cases like this. I took part in that case, and I affirmed the non-suit on a different ground, and expressly abstained from expressing any opinion on the point now before us; but now that I am pressed to give an opinion on the point, I must, with all deference to the Chief Justice, adhere to the opinion of the Collective Judges in the case reported in Vanderstraaten. I therefore think that the order of the District Judge is right, and it should be affirmed.

Since writing the above I had the advantage of reading the opinion of my learned Brother, but I cannot agree with him that there is not an appealable order.

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Present:—BURNSIDE, C. J.. and CLARENCE & DIAS, JJ.

(*March* 6 *and April* 3, 1891.)

D. C. Kurunegala, No. 5,476.	WEERAPPA PULLE v. MEERA LEBBE and another. ABDUL CADER, substituted plaintiff.

Judgment—against two defendants—substitution of plaintiff—"process to enforce the judgment"—re-issue of writ—revival of judgment against one defendant—Ordinance No. 22 of 1871, section 5—prescription.

Proceedings taken for the substitution of a person as judgment creditor in the room of the original plaintiff do not constitute a "process of law to enforce the judgment" within the meaning of section 5 of the Ordinance No. 22 of 1871, so as to bar the statutory presumption of satisfaction after ten years.

A writ returned by the Fiscal unexecuted may be re-issued, and such re-issue within ten years interrupts prescription of the judgment.

In the case of a judgment against more than one defendant, issue of process or other causes which are operative against one defendant are also effectual to keep the judgment alive against the other defendants, and a judgment cannot be revived against the one without its being revived against the others also.

Judgment was obtained upon a bond in June, 1880, against the 1st defendant as principal debtor and against the 2nd defendant as surety. Writ issued on June 25, 1880, against both defendants, and certain property was seized by the Fiscal. The property was not sold for want of bidders, and the Fiscal returned the writ to the Court unexecuted with a report to that effect. The writ was extended and re-issued against the 1st defendant only on April 26, 1881, and certain property of the 1st defendant was seized and sold, and the proceeds were drawn on April 2, 1882. The judgment having been subsequently assigned by deed to Abdul Cader, the appellant, on January 7, 1890, Abdul Cader obtained a rule on plaintiff and defendants for the purpose of having himself substituted plaintiff on the record. The rule was made absolute against the 1st defendant on February 4, 1890, and a fresh rule obtained by Abdul Cader for the same purpose was made absolute against plaintiff and 2nd defendant on April 29 and July 18, 1890, respectively.

On July 24, 1890, the substituted plaintiff obtained a rule on the defendants for reviving judgment. After discussion of this rule, the District Judge (P. Arunachalem), by his order of October 20, 1890, made the rule absolute as against the 1st defendant only, observing that "no step taken against 1st defendant can affect the 2nd defendant (8 S. C. C. 74), nor can the fact of the writ remaining in the Fiscal's hands subsequent to June 15, 1880 (9 S. C. C. 68). I am of opinion that as against the 2nd defendant the judgment must be deemed satisfied by lapse of ten years. And he accordingly discharged the sale as against the 2nd defendant.

From this order the substituted plaintiff appealed.

Dornhorst for substituted plaintiff appellant. The proceedings taken to substitute appellant as plaintiff on the record in February, 1890, interrupted prescription of the judgment. It is an act *inter partes*, and done as a step in enforcing the judgment, and so is a legal process within the meaning of section 5 of the Ordinance No. 22 of 1871. Further, the re-issue of writ in April, 1881, certainly prevented the presumption under the above section, and the judgment was alive as against both defendants. It is submitted that the District Judge was wrong in discharge to revive judgment as against the 2nd defendant.

Layard, S.-G., for 2nd defendant respondent.

The substitution of a new plaintiff was not the issue of a process within the meaning of the Ordinance, and did not prevent the statutory presumption from arising. As to the so-called re-issue of writ in 1881, it is submitted that it was not an issue of writ as contemplated by section 5: it merely amounted to a return to the Fiscal of the writ which originally issued in June, 1880, for the purpose of selling the 1st defendant's property which had already been seized under it. It was in fact simply an order to the Fiscal to carry out the original writ and to do his duty. Further, if it can be treated as a re-issue of writ, it was illegal, as the Court could not issue a writ limited to one defendant. Even if good, re-issue of writ against one defendant would not keep alive the judgment against the other.

Cur. adv. vult.

On April 3, 1891, the following judgments were delivered:—

BURNSIDE, C. J.—The Civil Procedure Code has repealed the 5th section of the Ordinance 22 of 1871, but all rights which accrued under it have been conserved: hence this appeal. My brother Clarence has explained that his judgment, reported in 9 S. C. C. 68, does not touch one of the questions now before us, viz., whether a judgment may be revived as against one judgment debtor and not as against the other. I have no doubt myself on the point that it may not. A judgment against two or more defendants is joint and several, and it would not be possible to convert a joint judgment against several into a sole judgment against one by merely reviving it as against him. The whole character and scope of the security would be changed.

The section in question raises a presumption that a judgment has been satisfied which is ten years old, "unless some writ, warrant, or other process of law shall have been issued to enforce the same".

The important question is,—to what proceedings do the words "other process of law to enforce the same" refer? I said at the argument that I did not consider that the substitution of a plaintiff on the record was a "process of law" to enforce the judgment within the meaning of the clause. The process must be *ejusdem generis* with a writ or warrant, *i.e.* final process, and substituting a plaintiff on the record for one that has died is only a step to render final process possible. This is still my opinion.

The re-issuing of the writ against the 1st defendant was, however, distinctly process "to enforce the judgment". It was said that in this case it was not competent for the District Judge to order a writ to re-issue. There is no authority for such position. To order a writ to re-issue is certainly within the power of a District Judge, and a writ being final process, we cannot enquire now whether or not there were good grounds for the re-issuing of it as against the 1st defendant only. No objection was taken to it at the time it was made—it remains a part of the recorded proceedings, and it is too late now to question the propriety of it.

This then being an operative "process" within ten years, keeping the judgment alive as against the 1st defendant, it did, in my opinion, also keep it alive against the other, and the plaintiff was entitled to have the order he asked for, reviving the judgment as against both defendants; and the District Judge having ordered it to be revived as against the 1st defendant only, the order must be enlarged to embrace the 2nd defendant as well, and the plaintiff must have his costs.

CLARENCE, J.—This is an appeal by the judgment creditor in the case from an order made on his application to revive judgment. The District Judge has allowed the application to revive the judgment as against the 1st defendant and refused it so far as concerned the 2nd defendant. And the judgment creditor appeals from the refusal.

The judgment was entered up on June 9, 1880, against the two defendants jointly and severally upon a warrant of attorney to confess judgment. The obligation on which the plaintiff declared was an obligation whereby the 1st defendant as principal debtor bound himself to pay a sum of money and mortgaged land as security and the 2nd defendant joined as surety. The judgment, however, which was entered up on June 9, 1880, was a simple judgment for a sum of money, and contained no special reference to the mortgage. The application to revive from which this appeal arises was made in July, 1890; so that if there were no steps between these two dates, the judgment must, by virtue of Ordinance 22 of 1871 section 5, be presumed to have been satisfied, and cannot be revived. Certain proceedings took place in the interim directed to the substitution of another party as judgment creditor in the room of the original plaintiff, who died after the judgment was entered up. We intimated during the argument of the appeal that we cannot view such proceedings as "process of law to enforce the judgment" within the meaning of Ordinance 22 of 1871 section 5. We must therefore look to see whether any other proceedings have taken place since the judgment was entered up which will prevent the statutory presumtion from arising. On June 25, 1880, writ was issued against the two defendants, and so far as we can gather from the paper book, some property was seized but for want of bidders not sold. (See the District Judge's note pp. 11, 12.) The writ seems then to have been return-

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ed by the Fiscal unexecuted. After this, in April, 1881, we find a note of the "re-issue" of the writ expressed as directed for the purpose of selling "the unsold lands belonging to the 1st defendant". Under the writ so placed in his hands, some property was actually sold, and in September, 1881, the Fiscal made a return reporting a recovery of Rs. 14·63 only. It was argued on respondent's part that this so-styled "re-issue" was irregular and ought not to be taken into account, for that a writ once returned cannot be re-issued. I do not assent to that contention. Assuming that there was some irregularity in the matter, it was evidently waived by the 1st defendant, and the result was that an actual recovery was made from property of his. We must take it that in 1881 there was a writ placed in the hands of the Fiscal on which an actual recovery was made; and the question is—and this is the substantial question in the matter—whether this proceeding directed against the 1st defendant has the effect of preventing the statutory presumption from arising in favour of the 2nd defendant. You cannot revive a judgment against a party who once at all events was judgment debtor, unless there is *prima facie* indication that he still owes the judgment debt or part of it. Reference was made during the argument of the appeal to two decisions of mine reported 8 S. C. S. R. 74, and 9 S. C. R. 68. The latter case has no application to the present question; but it seems to have been supposed that in the former case I held that steps taken to enforce a judgment as against one defendant cannot prevent recourse on the judgment from becoming barred as against another defendant. I did not, however, hold anything of the kind. In that case there was no question raised under the Prescription Ordinance: the question then before me was merely, whether the judgment creditor was entitled to re-issue execution against the defendant who appealed; and all that I held was that inasmuch as the judgment against that defendant had become dormant, therefore no execution ought to issue as against him until the judgment had been revived. It was not contended that the judgment had been revived, and I considered that the steps which had been taken to enforce the judgment as against another defendant only did not prevent the suit from becoming dormant so far as concerned himself. I may have been right or wrong as to that, but the question now is quite a different one. We have to deal with an actual application to revive the judgment against this defendant as well as his co-defendant, and the question is, whether the Court can and should restrict the revival to one defendant only, viz., the 1st defendant.

The 5th section of the Ordinance declares that every judgment shall be deemed to have been satisfied after the expiration of ten years from its date unless it shall have been "duly revived" or unless "some writ, warrant, or other process of law shall have been issued to enforce the same", in which case the ten years are to reckon from the date of the revival or of the last issue of such writ, warrant, or process. There has been no revival as yet, this being in fact an application to revive; but, in April, 1881, there was an issue of process against the property of the 1st defendant. Section 5 of the Ordinance 22 of 1871 is not framed like sections 6, 7, 8, 9, 10, and 11, or the English Act of James I., bearing the remedy by action on the creditor's claim. It goes further and declares that the judgment shall be "deemed to have been satisfied" after a certain lapse of time, unless a certain thing has been done. Now, we have, in the present case, a judgment entered up against two defendants jointly. The whole judgment debt could be recovered from either. I cannot understand how satisfaction of such judgment can be presumed in the case of one of the joint debtors and not in the case of the other. It seems to me that, if the judgment is alive at all, it is alive as against both debtors, and that, the process issued in 1881, under which property of the 1st defendant was seized, having kept the judgment alive, it is effectual against both. I think therefore that the plaintiff's appeal succeeds. The order appealed from must be varied and plaintiff's application to revive allowed *quoad* both defendants. The District Judge purported to make plaintiff's rule absolute as regards 1st defendant and to discharge it as regards the 2nd defendant. The order will be simply that the plaintiff's rule be made absolute. The 2nd defendent must pay plaintiff's costs of this appeal.

DIAS, J., concurred.

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Present:—BURNSIDE, C. J.

(*February* 20 *and* 26, 1889.)

P. C. Colombo, No. 2,512. } PERERA v. SILVA and others.

"Lottery"—"keeping" a place for the purpose of drawing a lottery—evidence—Ceylon Penal Code, section 288.

The Ceylon Penal Code, section 288, enacts: "whoever keeps any office or place for the purpose of drawing any lottery, shall be punished with imprisonment," &c.

Held, that the above section contemplates only lotteries held in a place avowedly kept for the purpose of drawing lotteries, and that permitting a lottery to be held in a place on one occasion is not "keeping" that place for the purpose of drawing any lottery within the meaning of the above section.

The 4th defendant appellant was charged by the Police Magistrate with having kept a place for the purpose of drawing a lottery, under section 288 of the Penal Code. It appeared that the 1st, 2nd, and 3rd defendants got up a lottery and asked the chief headman of the village for permission, which however was refused. The first three defendants, who were promoters of the concern, held the lottery in the compound of the appellant's house. The Police Magistrate found that the appellant had allowed the lottery to take place in his compound, and that even the prizes were produced from his room, and thereupon convicted the appellant.

Dornhorst for 4th defendant appellant.

Cur. adv. vult.

On February 26, 1889, the following judgment was delivered :—

BURNSIDE, C. J.—The accused appellant in this case was charged that he did keep a place for the purpose of drawing a lottery, in breach of section 288 of the Ceylon Penal Code.

The Magistrate is quite satisfied that defendant is guilty of allowing a lottery to take place in his compound, and thereupon convicts the accused of the charge and sentences him to six months' rigorous imprisonment. The evidence, that the ground on which the alleged lottery was held or proposed to be held was the defendant's, is of the most unsatisfactory character, and it is certainly not proved that he in any way did even what the Magistrate is satisfied he did, viz., allow a lottery to take place there, and it seems frivolous that a Court of Appeal should be required to enunciate as a legal conclusion, that "permitting" a thing to be done in a particular "place" on one occasion does not satisfy a charge of "keeping" the "place" for the purpose. On the evidence and even on the Judge's finding on it, no offence has been established. For myself I do not hesitate to state that the "keeping", made criminal by the Code, does not refer to isolated lotteries in a place avowedly kept for another purpose, such as a lottery in a man's private dwelling house or in a church or school bazaar, but to the keeping of a place where the avowed object is for the purpose of drawing a lottery or lotteries. The conviction is set aside and the defendant acquitted; and, in any case, looking at what took place as a village amusement at a festive time, it does seem to me that to impose six months' imprisonment with hard labour on one of the villagers, who took part in it or even was instrumental in getting it up, would be a sentence of Draconian severity.

Present:—CLARENCE and DIAS, JJ.

D. C. Galle, No. 55,488. } LEWISHAMY v. TAMBYHAMY. BABONA, Intervenient.

Partition suit—intervention—non-payment of costs of a previous action—practice.

The practice as to stay of proceedings for non-payment of costs of a former action is not applicable to interventions in partition suits, and such interventions will be allowed and proceedings will not be stayed, notwithstanding non-payment of costs of a previous action for the same interest in land.

This was a partition suit. The appellant, Babona, filed a petition of intervention claiming an interest in the land to be partitioned. At the trial the appellant was examined, and admitted that she had brought a previous action for the same share and had been non-suited with costs and that those costs had not been paid. Thereupon the District Judge (G. W. Paterson) recorded that he rejected the intervention until she paid the costs of the previous action.

The intervenient appealed.

Morgan for appellant.

VanLangenberg for respondent.

Cur. adv. vult.

On May 19, 1891, the following judgments were delivered :—

CLARENCE, J.—This is a partition suit. No decree has been made as yet. Appellant appeals from an order refusing her petition of intervention.

In 1885 appellant brought an action, No. 50,721, D. C. Galle, to eject present plaintiff and two others from a garden styled Delgahawatte, which is the subject matter of the present suit, and was non-suited with costs; appellant had asked leave to amend by joining additional parties, and leave was given, subject to payment of costs, which appellants never paid. In July, 1890, appellant instituted another action concerning the same land against present plaintiff and a large number of other persons, and that suit was stayed for non-payment of the costs of the former action. Meanwhile, in January, 1890, present plaintiff instituted the present action against certain persons, not including appellant, for a partition of the same land. Appellant presented a petition of intervention claiming a share of the land, and the then District Judge rejected the proposed intervention upon appellant's admission that she had not yet paid the costs of her first action.

We have long adopted in this Court the English practice as to stay of proceedings for non-payment of costs of a former action, a stay which is of right; and if we are to apply this practice *mutatis mutandis* to intervention in a partition suit, the result, I apprehend, would be that the intervention might be accept-

ed, but that all proceedings on it would be stayed until the costs already incurred should be paid. But on consideration of the matter I have come to the conclusion that we ought not to apply this practice to interventions in partition suits. Section 9 of the Partition Ordinance is very stringent, and for ever shuts out of the land all persons not parties to the suit, reserving only some claim for damages. The duty of every plaintiff in a partition suit as defined by section 1 is to ascertain in his plaint all the parties interested in the land, and a duty is cast on the Court to guard, so far as possible, against intentional omissions. When the creditor to whom the costs are owing has himself taken the aggressive and begins a suit, which, unless the debtor intervenes, will for ever shut the debtor out of the land, I am disposed to think that the principle of the English practice scarcely applies.

I think that this order should be set aside, and the appellant allowed to intervene, and I would leave all costs to abide the event.

DIAS, J.--The rule with regard to stay of proceedings in a subsequent suit for the non-payment of the costs of a previous suit hardly applies to this, which is a partition suit in which, if the appellant is not heard before decree, he will be for ever barred from ascertaining his right to the land. I agree with my learned brother that the judgment should be set aside.

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Present:—CLARENCE and DIAS, JJ.

(*May* 8 *and* 26, 1891.)

D. C. Negombo, Testamentary No. 4. } In the matter of the last Will and Testament of KURUKULA-SURIYE AUGUSTINO FERNANDO of Negombo, deceased.

Will—attestation—notary practising in one language and instrument written in another—Ordinance No. 7 *of* 1840, *section* 14, *and Ordinance No.* 2 *of* 1877, *section* 11, *and section* 26, *sub-section* 10.

Section 14 of Ordinance No. 7 of 1840 enacts that no will shall be valid unless (among other things) the signature "shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses," &c.

Section 11 of Ordinance No. 2 of 1877 provides that every appointment for the office of notary shall specify "the language or languages in which he is authorized to draw, authenticate, or attest deeds or other instruments".

Held, that a notary authorized to practise in one language may properly attest an instrument written in another, writing the attestation clause in the language in which he is authorized to practise.

In the case of a will written in the Tamil language and attested by a notary authorized to practise only in the Engish language, the attestation clause being written in the English language,—

Held, that the will was duly attested and was rightly admitted to probate.

The will propounded was one written in the Tamil language, and purported to be attested by Miliani Henry Sansoni, a notary authorized to practise in the English language only, and the attestation clause, which was in English, and was signed by the notary in English, certified that the testator acknowledged the signature in the presence of the witnesses.

The testator appointed two of his minor children as executors, and nominated the respondent to this appeal as curator over them for the purpose of managing the estate until they came of age. The respondent produced the will to the Court with the necessary material, and applied for letters of administration *durante minore ætate* and for certificate of curatorship over the minor executors, but no respondents were named in the application. On January 16, 1891, the Court made an order *nisi* declaring the will to be proved and ordering letters of administration *durante minore ætate* and certificate of curatorship to be issued to the applicant. On January 21, 1891, the appellants, who were two other children, and son-in-law of the testator, entered a caveat and urged that the will was not duly attested.

The District Judge (H. W. Brodhurst) overruled the objections and held the will to be proved, and observed as follows:—"It is contended that a notary cannot attest a deed written in a language other than that in which he is authorised to practise, and that a notary cannot attest a deed which he has not himself drawn and authenticated. If the words of the Ordinance were 'authorised to draw, authenticate, *and* attest', it might perhaps be contended that a notary was compelled to perform all these operations in respect of every instrument with which he had to deal. But as the words are 'draw, authenticate, *or* attest', it is clear that a notary may either draw a deed, or authenticate a deed, or attest a deed in the language in which he is authorised to practice."

The opponents thereupon appealed.

Withers (*Dornhorst* and *Wendt* with him) for the appellants.

Browne (*Cankeratne* with him) for the respondent.

Cur. adv. vult.

On May 26, 1891, the following judgments were delivered :—

CLARENCE, J.—The question for decision on this appeal is—whether the document propounded as the will of Kurukulasuria Agostino Fernando ought to be

admitted to probate. Appellants, who oppose the grant, have taken two objections: first, that the document has not been attested as required by the Ordinance No. 7 of 1840; and secondly, they seek to found an objection in respect of certain erasures and interlineations said not to have been attested as required by law. We need say nothing on this second point, which does not arise at the present stage of the matter, though on the document being admitted to probate it may arise when the will has to be construed.

The document propounded as the will of Agostino Fernando is written in Tamil, which is the language of many of the Negombo Sinhalese. It purports to be attested by a notary and two witnesses. Admittedly this notary is a notary whose appointment under section 11 of Ordinance 2 of 1877 embraces the Enlish language only, and not the Tamil language. The attestation clause is written in English. The instrument is signed at its foot in English characters, and there is *prima facie* evidence, to rebut which no attempt has been made, that Fernando acknowledged his signature in the presence of the notary and witnesses and declared the instrument to be his last will and that he was then of sound mind, memory, and understanding. The instrument is written upon more than one sheet of paper, and each sheet has been signed at foot by Fernando, the notary, and the witnesses. Thus there is *prima facie* evidence that Fernando in the presence of a notary and two witnesses acknowledged his signature to it, and that he was then of sufficiently sound and disposing mind. But it is contended by the opponents that the notary had no power to attest the execution of the document, for that his authority did not extend to the attesting of an instrument written in Tamil. It is in effect contended that for the purposes of this attestation this gentleman was no notary. If that contention is sound, then the instrument, not having been attested by a notary within the meaning of the Ordinance of 1840, cannot be admitted to probate.

Section 11 of the Notaries Ordinance 1877 enacts that "every appointment for the office of notary shall be by warrant under the hand and seal of the Governor, and shall specify and define the district within which alone the person thereby appointed is to practise, and the *language or languages* in which he is authorised to draw, authenticate, or attest deeds or other instruments". It is admitted that Mr. Sansoni's warrant extends to the English language only. Admittedly he has no power to draw a will or other instrument in Tamil. Further, he can only "authenticate or attest" in the English language, and not in Tamil. If it be asked, what is meant by attesting in any particular language, all I can say is that this notary purports to have done his attesting in the English language, in which language he has written his attestation clause. We need not for the purposes of this appeal speculate as to what details are included in "attestations" as contemplated by the Ordinance, or to what length those details should be transacted in the language named in the notary's warrant. All that I think it necessary to say upon this appeal is, that I can see no impossibility in a Tamil will being attested in English that this attestation purports *in facie* to have been attested in English, and there is no material advanced by the opposition to the contrary. Mr. Sansoni is authorised for the English language, therefore I think that the opposition to this instrument fails and that the instrument has rightly been admitted to probate as the will of K. Agostino Fernando.

The executors appointed by the will are the testator's children of the second bed, Rosa and Manuel, who are minors. The testator having expressed by his will a desire that Istegu Peris should be curator over the children during their minority, the District Court has for the present committed to Istegu administration *cum testamento annexo*, an order to which no objection is apparent.

In my opinion this appeal should be dismissed with costs.

DIAS, J.—I am of the same opinion. The question for decision is, whether the will in question was attested by a duly licensed notary public. Last wills in this colony are executed in two forms: (1) before a licensed notary public and two or more witnesses who shall attest such execution, or (2) before five or more witnesses who shall attest the execution. This will was executed before a notary and two witnesses; it is written in the Tamil language, but the attestation, which is the proper work of the notary, is written in the English language. The Ordinance No. 2 of 1877 deals with the law applicable to notaries, and section 11 enacts that he shall be appointed by warrant under the hand and seal of the Governor, and such appointment shall specify the language or languages in which he is authorised to draw, authenticate, or attest deeds or other instruments. This section contemplates three distinct independent acts, and the notary may do one or the other of these acts, or may do all of them, with respect to deeds or other instruments which he attests. The notary in this case is licensed to draw, authenticate, and attest deeds or instruments in the English language, and the action of the notary in this case was confined to attesting the testator's signature. This attestation is written in the English language, and therefore fulfils one of the conditions of the license.

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The body of this will was probably written by the testator himself in his own language, or written by somebody else in his presence and by his authority, and all that the notary had to do was to see that the testator was of sound and disposing mind, and understood the nature of the instrument he was signing, and that he signed the will in the presence of the notary and attesting witnesses, all being present at the same time. All these requirements seem to have been complied with, and the notary appended to the will the attestation clause required by the Ordinance 2 of 1877. If the law were otherwise, a Sinhalese or Tamil testator may have to die intestate much against his will, though a notary was present, who was only licensed to practise in English. In the majority of cases testators do not desire that the disposition of their property should be known, and write their own wills, and all that the notary need know is that the document which the testator wishes to sign is one, of the contents of which hs is well acquainted. On a careful consideration of the whole case I am of opinion that the judgment is right and the appeal should be dismissed.

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Present:—BURNSIDE, C. J., and CLARENCE and DIAS, JJ.

(March 13, *May* 26, and *June* 9, 1891.*)*

D. C. Colombo, No. 2537. } CASI LEBBE MARIKAR V. ARUNACHALAM.

Fiscal—action against—notice—Ordinance No. 4 *of* 1867, *section* 21.

A letter written to the Fiscal giving notice that the party claims from the Fiscal a certain sum of money as damages for alleged negligence, and without intimating that any action will be brought, does not constitute a notice of action within the meaning of section 21 of the Fiscals Ordinance.

This is an action against the Fiscal for damages. The plaintiff was a writ holder in a previous action and sued the Fiscal for certain negligence and irregularity in carrying out the writ. The libel alleged that "notice in writing distinctly setting forth the grounds of action" was duly given to the defendant by the plaintiff's proctor by letter. The defendant in his answer denied that notice distinctly setting forth the grounds of action was given as alleged, and pleaded that, admitting the letter referred to, it was insufficient in law, in that it did not comply with the requirements of the Ordinance.

The letter in question was in these terms :—

"We have the honour to give you notice that we claim from you on behalf of Uduma Lebbe Marikar Cassie Lebbe Marikar, plaintiff in D.C. Colombo, case No. 285, a sum of Rs. 204·11, as damages sustained by him by reason of your gross negligence irregularity of proceeding, and want of ordinary diligence in not carrying out the sale of defendant's property seized by you under writ D. C. Colombo No. 285 on the 28th December 1888, by reason whereof extra rent and other charges were incurred and were deducted by you from the monies recovered under the said writ, thereby reducing the amount plaintiff wsa able to recover in satisfaction of his judgment"

The acting District Judge (*J. Grenier*) held this notice insufficient and dismissed the plaintiff's action. The plaintiff thereupon appealed.

The appeal was first argued on March 12 before CLARENCE and DIAS, JJ., and again on May 26 before the Full Court.

Browne for plaintiff appellant.

Dornhorst for defendant respondent.

Cur. adv. vult.

On June 9, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—This is an action against the Fiscal to recover damages for alleged negligence in the performance of his duties. The defendant has denied that sufficient notice of action had been given as required by section 21 of the Fiscal's Ordinance 1867. The District Judge upheld the defendant's plea and the plaintiff appeals.

I have carefully examined the instrument relied on as notice, which bears the form of a letter from the plaintiff's proctor to the Fiscal, and I can find no notice of action. It is simply a lawyer's letter in which they claim damages alleged to have been sustained by the plaintiff by reason of the Fiscal's gross negligence.

There is not one word of intimation that an action will be brought if the claim is not complied with—there is no notice of action whatever, and looking to the host of cases which are referred to in the text books, it is imperative that the notice should clearly state that the action would be brought.

This goes to the whole notice, and it is unnecessary to deal with the objection that the notice does not distinctly set forth the grounds of such action as required by the Ordinance.

The judgment of the District Judge must be affirmed.

CLARENCE, J.—This is an action against a Fiscal, plaintiff claiming damages for alleged "abuse of authority, gross irregularity of proceedings and gross want of ordinary diligence" in the carrying out of the sale under plaintiff's writ. The District Judge has dismissed plaintiff's action for want of the notice of action to which the Fiscal defendant is entitled, and the ques-

tion for decision on this appeal is, whether the letter of plaintiff's proctor amounts to a sufficient notice of action. The arguments upon the appeal before us were directed to the question, whether that letter discloses with sufficient distinctness the grounds of complaint now set out in the libel.

But upon looking at the letter I agree with the District Judge that it is insufficient for another reason, viz., that it is no notice of action at all. It gives notice of a "claim", but says not a word of any action or proceeding in litigation. For this reason the plaintiff's appeal fails and must be dismissed, and it becomes unnecessary to bestow pains on consideration of any question, whether, apart from this defect, the letter sufficiently sets out the causes of complaint declared upon, or any of them. It certainly does not disclose them all.

DIAS, J., concurred.

———:o:———

Present:—DIAS, J.

(December 12, 1890, *and March* 5, 1891.*)*

D. C. Kurunegala, No. 22/M 13 } MOHOTTIHAMY v. LEKAM MAHATMEYA.

Procedure—decree nisi—form of notice—copy decree—Civil Procedure Code, section 85—*Stamp Ordinance No.* 3 *of* 1890, *Schedule B, Part II.*

In the case of a decree nisi, it is not sufficient, under section 85 of the Civil Procedure Code, to give to the defendant a notice embodying the purport of the decree, but the defendant is entitled to receive an authenticated copy of the decree itself.

Such copy decree, before it can be issued, must bear the proper stamp duty as specified in the schedule to the Stamp Ordinance of 1890.

The plaintiff having obtained a decree nisi in this action against the defendant, his proctor submitted for signature to the Secretary of the Court a form of notice to be issued to the defendant. The notice, which was stamped as a notice, embodied the substance of the decree nisi, but had no copy of the decree itself attached to it. The Secretary refused to sign and pass the document, and submitted his grounds in writing to the District Judge, who thereupon made the following order:—

"Mr. Modder for plaintiff having obtained a decree nisi in plaintiff's favour tendered to the Secretary of this Court a notice thereof for issue to defendant in terms of section 85 of the Civil Procedure Code. The Secretary has declined to sign the notice on the ground (1) that plaintiff has taken no copy of the decree, and (2) that if the notice is held to contain a copy of the decree, it is insufficiently stamped inasmuch as it bears a stamp only for the notice and not for the copy decree.

The Secretary has in support of his contention submitted a copy of the Hon'ble the Colonial Secretary's Circular No. 82 of 8th September last annexing the form of the notice to be used in such cases, and which form provides for a copy decree being annexed to it. The opinion of the Colonial Secretary on this matter has of course no legal effect, but the form is an excellent one, and can hardly be improved upon.

The form tendered by Mr. Modder is certainly not so good, but it contains nearly all that is material in the decree. It has been so framed as to evade the making of a copy decree, which, it was believed, would require a fresh stamp.

The words in the Stamp Ordinance 3 of 1890 relied upon by the Secretary are: "No party shall be allowed to take any proceedings on or by virtue of any decree or judgment without first taking a copy thereof." These words are sufficiently comprehensive to include the issue of a notice of a decree nisi, but I am inclined to doubt whether this can be considered a proceeding taken by the party. It seems to be rather a proceeding taken by the Court. The concluding part of section 85 of the Civil Procedure Code, under which the proceeding is taken, states that when the defendant is in default of appearance on summons and the plaintiff appears "the Court shall proceed to hear the case *ex parte* and to pass a decree nisi in favour of plaintiff"............"and *shall thereupon issue* to the defendant a notice of such decree". Compare the words which I have underlined with the words in section 55 "upon plaint being filed....... the Court *shall order a summons*... ....*to issue* signed by the Secretary........requiring the defendant to appear and answer the plaint," &c.

The Legislature appears to me to have intended that the Court should *ex mero motu*, without any application from plaintiff, issue to defendant notice of decree nisi. In this view, I am of opinion that not only is no copy decree nisi required to be taken by plaintiff, but that the notice itself need bear no stamp, for Part II of the Schedule to the Stamp Ordinance imposes a stamp only on a notice "applied for at the instance of a party to an action".

I therefore direct the Secretary to sign the notice tendered by Mr. Modder and to issue it.

I further direct that this record be forwarded to to the Attorney-General for his information and for such steps as he may deem necessary in order to obtain an authoritative decision on the point.

(Signed) P. ARUNACHALAM,
Acting District Judge.

The form of notice annexed to the circular of the Colonial Secretary referred to in the order of the District Judge was as follows:—

"Take notice that a decree *nisi*, copy of which is hereto attached, was passed against you in favour of the plaintiff on the......day of..........189.... and that the same will be made absolute unless you appear on the .....day of..........189....and shew sufficient cause to the contrary."

The matter having been referred to the Attorney-General according to the directions of the District Judge, *Layard, S.-G.*, moved in the Supreme Court that the order of the District Judge be brought up in revision. The record having accordingly been forwarded to the Supreme Court, the matter was discussed on December 12, 1890.

Layard, S.-G., in support of the application for revision.

Cur. adv. vult.

On March 5, 1891, the following judgment was delivered :—

DIAS, J.—On the 20th October, 1890, a decree nisi was passed under section 85 of the Civil Procedure Code, and on the 19th November the plaintiff's proctor submitted to the Secretary of the District Court for his signature a written notice purporting to be a notice to the defendant of the decree nisi. The Secretary declined to sign it as he thought that a copy of the decree nisi should be attached to the notice, or that the notice itself should bear the proper stamp. The District Judge, however, thought otherwise, and directed the Secretary to issue the notice, and forwarded the record with his order to the Attorney-General for his consideration.

Section 85 of the Code is very plain, and the words "notice of such decree nisi" mean the decree itself, and not a mere notice paper framed by the plaintiff's proctor embodying the substance of the decree. The defendant is entitled to receive the decree itself, or an authenticated copy of it; and the paper which the proctor proposed to issue only contained the proctor's opinion of what the decree is. The District Judge seems to have fallen into the error by supposing that the notice referred to in section 85 is not the act of the party, but of the Court. This, in one sense, is right enough, as distinguished from a personal notice by the proctor. In all matters of issue of process, such as summons, subpœna, and the like, they are issued by order of the Court; but nevertheless this must be applied for and obtained by the parties interested or their proctors. By the Stamp Act of 1890, Part 2, it is provided that no party shall be allowed to take any proceedings on or by virtue of any decree or judgment without first taking a copy thereof. Now, a copy decree is subject to a stamp duty, and what the proctor attempted to do was to avoid that duty by embodying in this notice the substance of the decree, which of course he cannot be allowed to do. I must therefore set aside the order of the 20th November, 1890.

———: o :———

Present:—BURNSIDE, C. J., and CLARENCE & DIAS, JJ.

(*May* 12 *and June* 5 & 9, 1891.)

D. C. Colombo, No. 1,075. } JANSZ v. IDROOS LEBBE MARIKAR.

Ejectment—title to land—insolvency of owner—assignee in insolvency—death of owner—right of heirs—Ordinance No. 7 of 1853, section 71.

Under section 71 of the Insolvency Ordinance the property of the insolvent vests in the assignee absolutely upon his appointment and not merely for the purposes of the trust; and in order that the property may so vest it is not necessary that a formal sequestration of the property should emanate from the Court.

Where the original owner of land was adjudicated insolvent and died after the appointment of an assignee, and his heirs sued in ejectment a third party in possession who put their title in issue,—

Held, that in the absence of a conveyance by the assignee or of prescriptive possession, the assignee was not divested of his title, and the plaintiffs' action failed for want of title in them.

The facts of the case sufficiently appear in the judgment of CLARENCE J.

The District Judge (*O. W. C. Morgan*), in his judgment upholding the plaintiffs' claim, *inter alia,* observed as follows: "It was urged in defence that when Johannes Perera in 1871 was declared insolvent, the property vested in his assignee and Johannes Perera lost all right to the property. I do not think the act of insolvency deprived the insolvent of his right to his property. The property only vested in his assignee for the benefit of his creditors. But referring to the insolvency proceedings, it does not appear that the property in question was ever sequestered. Before any sequestration was attempted to be made the insolvent died and no sequestration of his estate was made. This is borne out by the evidence of the assignee that he was in possession of the property in question as administrator of the estate of Ramanaden, who was Johannes Perera's lessee, and that he was never in possession as the assignee of the insolvent estate of Johannes Perera."

The defendant appealed from the judgment of the District Judge upholding the plaintiffs' claim.

The appeal was first argued before CLARENCE and DIAS, JJ., on May 12, *Grenier, A.-G.*, appearing for appellant, and *Dornhorst* (*VanLangenberg* with him) for respondent. But their Lordships having differed in their opinions it was re-argued before the Full Court on June 5, 1891.

J. Grenier for appellant. By virtue of section 71 of the Insolvency Ordinance the property of Johannes Perera vested absolutely in the assignee. So held by the English Courts under the corresponding section of the English act (12 and 13 Vict. cap. 106 s. 142) *Cooper* v. *Chitty.* 1 Bur. 20; *Cannan* v. *South Eastern Railway Company,* 7 Exch. 843; *Carlisle* v. *Garland* 7 Bing. 298. No fact divestitive of the assignee's title has been established, and therefore the plaintiffs, who claim as heirs of Johannes Perera, and who suing in ejectment must succeed on the strength of their title, fail in their action.

Dornhorst (*Withers* with him) for respondent. It is not contended that the property did not vest in the assignee. But to what extent did it vest? It is sub-

mitted, only for the purposes of the trust and not absolutely. The property not having been dealt with by the assignee at all, it must now be presumed that that purpose was satisfied, and the property reverted to the plaintiffs, who are heirs of the original owner. Further, it is submitted that the lands in question not having been sequestered in the insolvency proceedings, as found by the District Judge, the right of the plaintiffs to them continued, and they rightly claim the same against the defendant, who has no colour of title whatever.

Cur. adv. vult.

On June 9, 1891, the following judgments were delivered:—

BURNSIDE, C. J.—I was not present when this case was first argued in appeal on the demurrer. The only point raised at the argument before me was upon the question whether Perera's heirs could claim title upon which to sustain ejectment, he having been declared insolvent. On the facts disclosed in the evidence it is abundantly clear that Perera was declared insolvent, and assignees to his estate were appointed as far back as 1871, and thereupon by the operation of section 71 of the Insolvency Act these very lands vested in his assignee or assignees in succession, and not only Perera himself, but his heirs ceased to have any interest in them. It was argued that as the title of the assignee was only for the benefit of the creditors, and as so long a period had elapsed without the assignee having disposed of or dealt with the lands for the purposes of the trust, it must be presumed that the terms of the trust had been satisfied and that the lands had thereupon reverted to the heirs of the original owner. There is no principle of law for such a presumption, and it is against principle. The title to the land having once vested in the assignee, it could not be divested except by descent or devise or conveyance or prescription. There is no contention that it became divested by either of the first three modes. No doubt the heirs, like anybody else, might acquire title by prescription against the assignee; but there is no proof of such title, nor is it relied on.

It is clear, therefore, that Perera's heirs *qua* heirs had no title as against the assignees of their ancestor's estate; and although the defendant may be a wrong-doer, his possession is good against all the world except the actual owner.

I see no objection to the proposed order as to costs, if it be possible to separate them in accordance with the issues raised.

CLARENCE. J.—This is an action by the heirs of one Johannes Perera, who died in 1872, to eject the defendants from a house and land in Colombo.

It is not now disputed that Perera was the owner of this property in 1854. In January of that year Perera leased the premises to one Ramanaden for a term of 30 years. Ramanaden died soon after his entry under the lease, and the premises were thenceforward occupied by persons claiming under Ramanaden. Since the expiry of the lease the premises have been in the occupation of the present defendant and of persons under whom defendant claims, all of whom are entire strangers to the title. The plaintiffs were minors until recently. No title has been acquired as against Perera's representatives by prescription. The learned District Judge has upheld the plaintiffs' claim, and from this judgment the defendant appeals.

The appeal was pressed on the strength of certain technical objections to the averments of title contained in the plaint, which, it was contended, the learned District Judge should have upheld upon defendant's demurrer. It is unnecessary for us to expend time upon the consideration of those objections. Assuming for the sake of argument that they were well founded, the demurrer would, under the circumstances, have been allowed only with leave to amend, and it was admitted by Mr. Attorney upon the argument of this appeal that the evidence establishes the chain of title disclosed in the libel. It is admitted that Perera owned and that plaintiffs would inherit from him.

But there is another point made in defendant's answer and in the petition of appeal, which we cannot disregard, though it was hardly noticed at the first argument in appeal. Perera was declared insolvent in 1871, and it is suggested that the title to this property having passed by virtue of his insolvency to his assignees in insolvency, the plaintiffs have no title by virtue of which they can eject these defendants. However disinclined we may be to favour this contention raised by persons in the position of these defendants, who are absolute wrong-doers without any colour of title whatever, it is true thas the plaintiffs can only succeed in this action by shewing title in themselves. I cannot agree with the learned District Judge that in order to create title in the assignee under the insolvency it was necessary that any formal sequestration of the property should have emanated from the District Judge. Section 71 of the Insolvency Ordinance declares that after the adjudication all the insolvent's interest in his lands becomes absolutely vested in the assignee. But so far as appears, Perera's assignees, for reasons of their own which might or might not bear scrutiny, seem to have

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foreborne to realize this asset of their insolvent's estate. Don Sebastian, a witness called for the defence, deposed that he was assignee under the insolvency up to 1881, when another person was appointed in his room. I fail to gather from the materials in the case anything either in the nature of adverse possession, adverse to the title of the assignee, within the meaning of the Prescription Ordinance, or otherwise, which can serve to revest in Perera's heirs the title, of which Perera became divested by his insolvency. Plaintiffs are put to the proof of their title, and can only succeed by showing title. The insolvency and appointment of successive assignees are proved. The result is that plaintiffs do not establish title. I think therefore that plaintiffs' action fails, and defendant is entitled to judgment; but in dismissing plaintiffs' action with costs I would distinguish costs incurred by plaintiffs in establishing, in consequence of defendant's denials, the title of Perera and the status of plaintiffs as Perera's heirs. If these costs can be separated, plaintiffs should have their costs of this appeal.

DIAS, J.—After hearing the last argument and reading the opinions of my learned brothers, I agree to reverse the judgment.

———:o:———

Present:—DIAS, J.

(*March*, 28, 1890.)

P. C. Kegalle, No. 7,538. } WARD v. PUNCHA.

Jurisdiction—evidence heard by two Magistrates—that for prosecution by one, and that for the defence by the other—decision by the latter—practice—Criminal Procedure Code, section 19.

In a summary trial, where one Magistrate heard the evidence of the prosecution, and another Magistrate, his successor, heard the evidence for the defence and decided the case upon the whole evidence,—

Held, the second Magistrate had jurisdiction, under section 19 of the Criminal Procedure Code, to try and decide the case upon the materials recorded by his predecessor and himself.

The defendant appealed from a conviction. The facts relevant to this report appear in the judgment.

VanLangenberg for defendant appellant.

DIAS, J.—On the merits the Police Magistrate has arrived at a correct conclusion, and the only question which was pressed in appeal was, whether or not the Police Magistrate had jurisdiction to try and decide the case on the materials before him.

The proceedings were initiated by Mr. Bell, Police Magistrate, who, after hearing all the evidence for the prosecution, adjourned the further hearing for the evidence of the accused. In the meantime Mr. Bell ceased to be the Police Magistrate, Mr. Cooke having taken his place.

All the evidence for the defence was heard by Mr. Cooke, who finally decided the case. It was objected for the appellant that the Magistrate acted without jurisdiction, inasmuch as he had heard no part of the evidence for the prosecution, and the 19th section of the Procedure Code was cited in support of this proposition. I apprehend that the words of the section relied on are the words "on the evidence partly recorded by such first-named Police Magistrate and partly recorded by himself". These words do not seem to me to require the last, and the deciding Magistrate to hear at least part of the evidence for the prosecution. This section was evidently intended to avoid a difficulty which had previously existed by the change of Police Magistrates, and I think the section is large enough to embrace this case, in which the last and deciding Magistrate had only heard the evidence for the defence. It was mentioned at the Bar that there was some decision of this Court upholding the view of the appellant's counsel; but no such case having been produced, I am unable to say what that decision is.

———:o:———

Present:—DIAS, J.

(*August* 27 *and September* 18, 1890.)

D. C. Kurunegala, No. 6,831. } APPUHAMY v. SITENGIRALE.

Stamps—process—verification of service—affidavit of identity—Stamp Ordinance No. 3 *of* 1890, *Schedule B, Part II.*

When process has been served on a person pointed out to the officer serving the process, the affidavit of identity to be sworn by the party so pointing out the person for service is not "an affidavit for verifying service of process" within the meaning of the exemption mentioned in part II. of Schedule B to the Stamp Ordinance of 1890, and therefore requires to be stamped.

A rule to revive judgment was issued, and served by the Fiscal on a person pointed out as one of the defendants by the plaintiff. In moving to make the rule absolute, plaintiff submitted an affidavit of identity of the person so served with the rule. The Secretary submitted to the District Judge that the exemption in the Stamp Ordinance should be restricted to affidavits of service by Fiscal's officers and should not be extended to affidavits of identity sworn to by others. The District Judge (*P. Arunachalem*) however thought the affidavit came within the exemption, and accepted the affidavit and made the rule absolute. Thereupon the Attorney-General moved in the Supreme Court for

revision of this order under section 753 of the Civil Procedure Code.

Fisher, C. C., for the Attorney-General.

Cur. adv. vult.

On September 18, 1890, the following judgment was delivered :—

DIAS, J.—This case was brought before me under section 753 of the Civil Procedure Code, for the revision of an order of the District Judge of the 22nd August made under the following circumstances.

A rule was issued to the defendants to be served through the Fiscal as usual; but the Fiscal not being personally acquainted with one of the defendants, Kiri Menika, he served the rule on a person pointed out to him as Kiri Menika, and made his return to the Court accordingly. On the 18th of August the plaintiff moved that the rule might be made absolute, when he was required to produce an affidavit verifying the service of the rule on Kiri Menika. Accordingly, on the 22nd August, plaintiff produced an affidavit written on paper not duly stamped, when the Secretary of the Court pointed out that, under the Stamp Act 3 of 1890, the affidavit required a stamp. The District Judge, however, thought otherwise, and accepted the affidavit and acted upon it. The District Judge relied on the exemption under part II. of the Stamp Act, which exempts from stamps all affidavits or affirmations for the verification of service of process. Mr. Fisher, Crown Counsel, contended, as did the Secretary of the District Court, that that exemption only applied to Fiscal's officers, and not to outsiders, such as the person who swore the affidavit in question.

I cannot subscribe to this argument; but the objection to this affidavit is quite of a different character. The process was served by the Fiscal's officer, who was not personally acquainted with the person served, and the affidavit of a third party was required to fix the identity of the person on whom such process was served, and in this view of the matter I am of opinion that the order of the District Judge is erroneous and must be set aside.

———:o:———

Present:—CLARENCE, J.

(*November* 20 *and* 23, 1888.)

D. C. Colombo. No. 98,031. } ADAMJEE v. CADER LEBBE. BHAY ESSAJEE, Claimant appellant.

Costs—taxation of—class of the case—incidental proceedings—scale of costs—practice.

When costs have been awarded in an incidental proceeding in an action, such as the matter of a claim by a third party to funds in deposit, the costs should be taxed, not according to the amount involved in the incidental proceeding but according, to the class of the original action.

The plaintiff's action was for the recovery of a sum of Rs. 734·97, and was therefore an action in class II. according to the classification of actions in the District Court. There being a sum of Rs. 800 in deposit, there was, in February, 1888, a contest between plaintiff, the claimant appellant, who was execution creditor of defendant in another action, and two others, as to this sum; and the plaintiff having been defeated in this contest, was condemned to pay costs of the appellant and the other claimants. In June, 1888, the appellant, with notice to the plaintiff, submitted for taxation a bill of costs according to the scale of charges in an action of class III; the plaintiff was absent at the taxation, and the Secretary taxed the bill as in a case of class III. Subsequently, in October, 1888, after appellant had issued writ for the recovery for the amount of costs taxed, the plaintiff applied to the District Judge to review the taxation. The District Judge (C. L. Ferdinands) ordered the bill to be re-taxed in the second class, remarking that "the sum demanded in the libel at the date of its being filed was one coming under the second class, and consequently the bill should be taxed in that class", and he relied on the decision in D. C. Colombo, No. 92,072.* The claimant appealed from this order.

Wendt (*Morgan* with him) for claimant appellant.

Ramanathan (*Pereira* with him) for plaintiff respondent.

Cur. adv. vult.

On November 23, 1888, the following judgment was delivered :—

CLARENCE, J.—The first question to be decided on this appeal is, whether respondent, not having attended the taxation after notice, was rightly allowed to have the taxation reviewed by the Court in October. I cannot say that the District Judge was wrong in thus allowing respondent's application to have the taxation reviewed. No special time is limited by the Rules and Orders for references from the officer to the Judge in matters of taxation; and the notice of taxation was framed so as to lead respondent to suppose that the costs were to be taxed in the class of this action, viz., the second class. When respondent discovered that the costs had been taxed in the third class, he brought the matter before the Judge, and I cannot say that the Judge was wrong under the circumstances in entertaining it.

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* D. C. Colombo, No. 92,072. } WIJERATNE v. MENDIS.

November 25, 1886. DIAS, J.—The intervenient is liable to pay costs in the class of the case and cannot be allowed to reduce that class on the ground that the amount of his claim brings him into a different and lower class. The plaintiff's bill of costs as against the intervenient should be taxed in the same class as the case.

This was an action in the second class, in which a sum of Rs. 800 got into Court, to which sum, in the events which thereafter happened, the defendant became entitled. Several parties, in the character of judgment creditors of the same defendant in other actions, have been endeavouring to obtain payment of their judgments from this fund. The application out of which these costs were made payable by respondent to appellant was distinctly made and entitled as an application in this action; and although it so happens that the fund about which the several parties were struggling is a trifle over Rs. 750, which is the superior limit of the second class, I think the District Judge was right under the circumstances in directing the costs to be taxed in the class of the action in which the application was made.

I may point out that although the respondent has taken no objection on that score, the appellant seems to have got more on the taxation than he was entitled to; for the taxing officer has allowed the costs of two Counsels, when, so far as I can see, the matter would carry only the costs of one.

———:o:———

Present:—BURNSIDE, C. J.

(*June* 11 *and* 17, 1891.)

C. R. Haldummulla, No. 17. } MUDALIHAMY v. APPUHAMY

Ejectment—issue of title—party in possession—burden of proof—evidence.

In an action in ejectment, where the plaintiff is proved to have been in *bona fide* possession of the land at the time of ouster, the burden lies on the defendant to prove that he is owner of the land; and in the absence of such proof the plaintiff is entitled to judgment without proof of his title.

This is an action in ejectment. The plaintiff alleged title to a chena by purchase, and averred that he was in possession thereof since his purchase, and that defendants on a certain day encroached upon and took possession of a portion of the land. He prayed for a declaration of title and for damages. The defendants denied plaintiff's title and the possession alleged and averred title in themselves.

At the trial, the plaintiff, who began, led evidence in proof of his title and possession. But the Commissioner was not satisfied with this evidence, and held that plaintiff had failed to prove his title or possession, and dismissed the plaintiff's case. The defendants led no evidence at all. The plaintiff appealed from the judgment of dismissal.

Wendt for plaintiff appellant.

Sampayo for defendants respondent.

Cur. adv. vult.

On June 17, 1891, the following judgment was delivered:—

BURNSIDE, C. J.—The Commissioner has gone wrong in this case, because he erred in his judgment as to where the burden of proof lay.

The plaintiff was in the *bona fide* possession of the chena in question, and had cleared it for sowing, when the defendant entered upon it, sowed it, and put the plaintiff out. Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep it against all the world but the rightful owner; and if the defendant claimed to be that owner, the burden of proving his title rested on him, and plaintiff might have contended himself with proving his *de facto* possession at the time of the ouster. But he has chosen to give a body of evidence going to show that he was not only in possession, but has acquired title by prescription and purchase. The Commissioner does not think his evidence satisfactory as to title; nevertheless, as I have said, the actual possession being proved, it threw on the defendant the burden of proving title in himself, and he has not attempted to do so. Therefore the plaintiff was entitled to judgment, and the case will be sent back in order to enable the Commissioner to decide the latter part of the first issue as to damages.

———:o:———

Present:—CLARENCE, J.

(*June* 4 *and* 25, 1891.)

D. C. Galle (Criminal) No. 11,861. } DISSANAYAKE v. BASTIAN and others.

Grievous hurt—permanent impairing of the eye—Ceylon Penal Code, section 311*—evidence.*

The eye is not a "member or joint" within the meaning of sub-section 5 of section 311 of the Penal Code so as to make permanent impairing of the eye grievous hurt.

Nor does the permanent impairing of the eye without actual privation of sight constitute grievous hurt within the meaning of the said section.

There were five defendants in this case, of whom the first four were charged with voluntarily causing hurt by means of sticks, and the fifth was charged with causing grievous hurt by injuring the eye of a certain person. The medical evidence as to the injury to the eye was that it was permanently impaired. The defendants were convicted of the charges severally made against them, and they appealed.

Dornhorst for the first four defendants appellant.

VanLangenberg for the fifth defendant appellant.

Hay, A. S.-G., for respondent.

Cur. adv. vult.

On June 25, 1891, the following judgment was delivered :—

CLARENCE, J.—I see no occasion to interfere in this case, save as regards the 5th defendant, James. He has been convicted of voluntarily causing grievous hurt. The evidence, however, does not in my opinion establish that the man, whose hurts Dr. Huybertsz described, had sustained grievous hurt. It was argued on behalf of the Crown that the permanent impairing of the sight of an eye, which Dr. Huybertsz anticipated, satisfied the definition of grievous hurt, and Mr. Solicitor relied on the 5th clause of section 311 of the Code. I do not think that the eye is a "member or joint" within the meaning of clause 5.

The eye is dealt with in clause 2, which declares that "permanent deprivation" of the sight of an eye is grievous hurt. As I read section 311, permanent impairing of the sight of an eye is not enough. I alter the conviction in 5th defendant's case to one under section 314, and the sentence to the same as that imposed on the defendant Bastian.

———:o:———

Present:—BURNSIDE, C. J.

(*June* 25, 1891.)

P. C. Ratnapura, No. 6,671. } MODDER v. SENATAMBY.

Plaint—charge—possession of false weights—"fraudulently"—Ceylon Penal Code, section 259—Ordinance No. 11 of 1887, section 1—evidence.

Since the Ordinance 11 of 1887, in a charge of possession of false weights under section 259 of the Penal Code, it must be alleged in the plaint and proved that the defendant possessed the weights intending that the same may be fraudulently used.

In a case where the Magistrate has not framed a charge but convicts the defendant on the plaint of the complaining party, the Supreme Court would not amend a defective plaint by inserting necessary words so as to make it disclose an offence.

The facts of the case appear in the judgment of the Chief Justice. The defendant appealed from a conviction.

Dornhorst for defendant appellant.

BURNSIDE, C. J.—This case forcibly illustrates the mischief which is ensuing, and will ensue, from a want of precision and a looseness in summary proceedings before Magistrates.

The complaint on which the accused was prosecuted discloses no offence at all. The Magistrate has not framed a charge, nor has he recorded a conviction of any particular offence, but sentences the accused to rigorous imprisonment for a month and to pay a fine of Rs. 100 under 259th section of the Penal Code. The section in question is one which has experienced some vicissitudes. As originally prepared and submitted with cognate clauses to the Legislature, it made it penal for any one to possess any "weight or measure which he knew to be false and intended to be fraudulently used". In the process of gestation in the Legislature, the words "which he knew to be false" and also the word "fraudulently" were deleted, and so the section when it was matured into law made it penal, say, in the owner of a Museum, and for which he was liable to one year's rigorous imprisonment and indefinite fine, to be in possession of a false weight, although he might not have known that it was false and only lent it as an article of curiosity. However, after the lapse of four years, it would seem to have been concluded that this was not an enactment which the exigencies of crime called for, or perhaps it may have been decided that it was not precisely what the Legislature meant, and an amending Ordinance No. 11 of 1887 was passed, which restored the word "fraudulently" to this and the other clauses wherever it had been deleted four years ago, but yet the other important words "which he knew to be false" were not referred to, and are still conspicuous by their absence.

Now, the complaint in this case takes no notice of the Ordinance 11 of 1887. Perhaps the Police Magistrate overlooked it, or thought it unnecessary, but he follows the disabled words of the Code, and does not allege that the defendant either knew that the measure which it is alleged he possessed was false, or that he intended that it should be fraudulently used. It is a matter of public congratulation to be able to say that the mere possession of a false weight is no longer an offence. Therefore, the accused could not be convicted, with serious penal consequences, of the alleged offence contained in the complaint. The Magistrate has not framed any charge. I cannot amend the plaint by inserting the word "fraudulently", because the complaint is the statement by the complainant of his wrongs, and I have no information upon which I could act as prosecutor and make myself a complainant; and even if I did, I could not send the case back and tell the Magistrate to frame a charge upon the revivified complaint, because in going through the record I find not a tittle of evidence that the defendant knew the measure to be false, and unless he knew the measure to be false I do not see how he could have intended it to be fraudulently used; but the Legislature has assumed that he may, and it will be my duty to decide that point with the able assistance of Counsel, when it arises, but happily for me it does not arise in this case, and so it is my duty to acquit the accused, or, rather to say, I remit the sentence because he has

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been convicted of no offence, and it ought necessarily to follow that he has incurred no penalty. I find that the prosecutor produced two cases to the Magistrate in which the accused had been previously convict d, both convictions being after the passing of the Ordinance 11 of 1887, and in neither was any notice taken of Ordinance 11 of 1887. The defendant pleaded guilty in one case and appealed in the other, and I feel bound to say that the sentence of conviction was affirmed, but the punishment was materially mitigated by this Court. In neither of these cases, either in the plaint or in the charge, was it alleged that the accused knew the weight to be false, or that he intended to use them fraudulently. Consequently punishment was imposed on convictions which on their face disclosed no offence.

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Present:—Burnside, C. J., and Clarence and Dias, JJ.

(*June* 30, *and July* 22, 1891.)

D. C. Anuradhapura, No. 13. } Appavupillai v. Ferdinand.

Prescription—acknowledgment of debt—promise to pay—Ordinance No. 22 of 1871, *section* 13—*settlement of issues—pleading.*

Under section 13 of the Prescription Ordinance of 1871, an acknowledgment, to take a case out of prescription, must not only admit the debt to be due, but must involve an unconditional promise to pay or a promise to pay on a condition which has been fulfilled.

Where after a plea of prescription had been put in, the plaint was amended by inserting an allegation that the defendant had within the prescriptive period acknowledged the debt and promised to pay it and no further pleading was put in by the defendant by way of answer to the amended paint.—

Held, per Burnside, C. J., that, although the document upon which the plaintiff relied as an acknowledgment to take the case out of prescription did not contain a promise to pay, yet such promise must be taken to have been admitted on the pleadings, and the plea of prescription therefore failed.

Observations by Burnside, C. J., on the settlements of issues to be tried by the Court.

The plaintiff commenced this action on November 26, 1890, for the recovery of money lent to defendant in 1883. The defendant pleaded prescription, and thereupon the plaintiff amended the plaint by pleading that by certain letters written by defendant to plaintiff in July 1889 the defendant had acknowledged and promised to pay the debt. The defendant did not amend his answer or file any further pleading. At the trial the District Judge *(H. A. Hellings)* recorded that the issue was as to whether or not the claim was barred by prescription under section 8 of Ordinance No. 22 of 1871, and in the result gave judgment for plaintiff.

The letters referred to ran as follows:—

I am unable to repay you the loan you kindly lent me just now. I shall be glad to give you a pro-note payable three months hence.

and

I am unable to send you the pro-note to-day as I must go home to refer to your letter for the correct amount to be inserted. I shall be glad to send the note by to-morrow afternoon.

The defendant appealed from the judgment of the District Judge.

Browne for defendant appellant.

Dornhorst for plaintiff respondent.

Cur. adv. vult.

On July 26, 1891, the following judgments were delivered:—

Burnside, C. J.—There cannot be any doubt that the acknowledgment of the debt in this case, upon which the plaintiff relied to take the debt out of the statute of prescription, is insufficient for the purpose. The law is too well settled on the point to admit of argument. There must be not only acknowledgment that the debt is due, but an unconditional promise or a promise on a condition which has been fulfilled to pay the debt. Now, whilst the letters relied on by the plaintiff certainly contain a complete acknowledgment of the debt, there is no promise to pay either conditionally or unconditionally. In fact, the letters appear to me to have been especially guarded, and avoid making an unconditional promise, and from the evidence of the defendant I imply that he intentionally so worded his letters in order to lull the plaintiff into believing he had made a promise when indeed he knew he was deceiving him. The defendant seems to be utterly unprincipled and dishonest.

There is, however, another point which cannot be overlooked, and that is whether the defendant on his pleadings had put himself in a position to contest the effect of those letters. I am sure he had not. After the plaintiff had amended, the defendant put in no further answer. Had he demurred to the amended libel, his demurrer must have been upheld; but he neither demurred to it, nor even answered it at all. Now, take it that the defendant's plea of prescription was well pleaded to the plaintiff's claim for money lent in 1883 as set out in the original libel. To that plea the plaintiff by his amendment says:—"Yes, it may have been prescribed, but you afterwards, by your two letters which I produce, promised to pay it." To this allegation the defendant in his pleadings has not demurred, and its sufficiency in law has not been contested; and not being answered or objected to, it must be taken as admitted on the pleadings.

I think we should be careful in administering the Code not to establish that under it a judge may settle *any* issues of law or fact between the parties and proceed to try them. The only issues which he may settle are those material propositions of law or fact which are affirmed by one side and denied by the other—I am using the words of the Code—and they must arise on allegations made in the plaint or in the written statements tendered in the suit. Now, I cannot find that the material proposition of fact made by the plaintiff as to the writing of these letters by the defendant and their sufficiency to take the case out of prescription has been denied by the defendant or even questioned by him, and I don't think the District Judge had any right to frame an issue of prescription, and in fact there was no issue of prescription tried. The only evidence adduced was that of the defendant, and there is not a word in it on the issue of prescription. In truth, the District Judge directed his attention to the legal question whether the letters did not contain a sufficient acknowledgment to take the case out of prescription. This was not an issue of fact: it was distinctly an issue of law, and I can't see that the defendant raised it on his pleadings. It may be that the parties went down to trial to settle whether the debt was prescribed or not, but that was the fault of the plaintiff's proctor, for which the plaintiff must not be held responsible.

It seems to me that the duty of this Court, now that we have entered upon a new era of procedure, is to insist that the recognized system of pleadings, by which suitors state their wrongs and ask for redress, and by which defendants are heard in their defence, should be adhered to. The rights of suitors have long been seriously jeopardized and too often violated by the loose and slovenly way in which proceedings in our minor courts have been conducted, and for which I am afraid this Appellate Court is not entirely blameless. If it had been thought right that proceedings at law should be free from all the precision and exactness by which alone the parties to a suit may intelligently confront each other before a Court, it would have been easy for the Legislature to have done so. But the Legislature in its latest utterances has prescribed that there should be distinct issues of fact and issues of law in the shape of pleadings: it has given to a particular profession the monopoly of framing these pleadings, because of their supposed special knowledge of it, and we are the guardians of the rights of the public in this respect, that whether from the incapacity of those so entrusted or any other cause, no departure should be permitted which lets in uncertainty and confusion in pleading with all its consequent evils to suitors.

I would affirm the judgment, not on the grounds stated by the District Judge, but on the grounds which I have stated.

Clarence, J.—The plaintiff sues the defendant, who is described as head clerk of the Anuradhapura Kachcheri, for Rs. 126 money lent. It is admitted that the defendant borrowed this sum from the plaintiff in 1882, and that the money has never been repaid; but the defendant takes his stand upon the Prescription Ordinance, and sets up the statutory bar as his answer to plaintiff's action. The question which we have to decide upon this appeal is, whether two letters which the defendant wrote to the plaintiff in 1889 amount to such acknowledgment as can avail to take the case out of the Ordinance. There seems to have been some confusion in the pleadings; but the plaintiff was allowed to amend his plaint, and the parties ultimately went to trial upon the issue whether there had been any acknowledgment by defendant, taking the case out of the operation of section 8 of the Prescription Ordinance. The acknowledgment relied on by plaintiff is contained in two letters which defendant admits having written to plaintiff in July, 1889.

Defendant admits having contracted this debt, and admits that he still owes the debt. He seems to have entertained no scruples as to the means to which he might resort in order to defeat his creditor, even to the length of abusing his official position. He admitted in the witness box that on an occasion when a writ against himself was transmitted to Anuradhapura from another court he kept it back for a year. He now, in answer to the present plaintiff's suit to recover his debt, takes his stand upon the Prescription Ordinance. If ever there was a case in which we could feel inclined to strain a point to overcome the defence of the statutory bar, this is that case. But the defendant is within his rights in setting up the Ordinance; and if the law be in his favour, we are bound to give him the benefit of it. The question merely is, whether the letters which defendant wrote in July, 1889, are enough to take the case out of the Ordinance.

As to the kind of acknowledgment necessary to take a case out of the Ordinance, there is no doubt. Under the repealed Ordinance of 1834, which was based upon the now exploded theory of a presumption of payment arising from lapse of time, a mere admission of the existence of the debt sufficed to repel the statutory bar. How the old theory of a presumption of payment was abandoned is a matter of legal history. (See 5 S. C. R. 62.) Under the Ordinance of 1871, section 13 of which incorporates almost verbatim the 1st section of Lord Tenterden's Act, we have to apply the same rule which the English Courts apply to cases under the statute of James I, viz., that the acknowledgment, to take a

case out of the enactment, must involve not merely an admission of the debt, but a promise to pay it. It is hardly necessary to cite authorities upon a matter so well settled. In *Tanner* v. *Smart* 6 B. & C. 603, the well-known case in which the idea of presumption of payment was finally abandoned, the words relied on were: "I cannot pay the debt at present, but I will pay it as soon as I can." That was held insufficient to take the case out of the statute without proof of the defendant's ability to pay. The late Lord Justice Mellish, in *Re River Steamer Company, Mitchell's Claim*, L. R. 6 Ch. 828, summarized the law clearly and quoted as accepted authority the exposition by Chief Justice Jervis in his book of "New Rules". There must be some writing containing an express promise on defendant's part to pay the debt or from which an unconditional promise to pay is a necessary inference, or else there must be a conditional promise to pay and proof that the condition has been satisfied. If, as Jervis, C. J., said, the writer, though admitting the existence of the debt, refused to pay it or reserves the matter for future consideration, that is not enough. We must also refer to the late case of *Bethell* v. *Bethell*, L. R. 34 Ch. D. 565. In the present case, what took place was this:—plaintiff was pressing defendant for payment of his debt, and on July 11, 1889, defendant wrote to plaintiff: "I am unable to repay you the loan you kindly lent me just now. I shall be glad to give you a pro. note payable three months hence". The other letter relied on, of date July 29, carries the matter no further. It is merely a letter by defendant excusing himself from sending the promissory note then and promising to send it next day. We may suppose that the promissory note was not sent, or plaintiff would be suing on it instead of on the original debt. However that may be, it is plain that these letters contain no unconditional promise to pay the debt. They amount merely to an admission of the debt, coupled with a statement that defendant could not then pay, and undertaking to send a promise in another form, viz., a promissory note, which undertaking, however, so far as we know, defendant did not perform.

The result is, that plaintiff's action is barred, there being nothing that takes the case out of the Ordinance. Whatever we may think of the defence from a moral point of view, it is a defence which the defendant had a right to set up, if he chose. It is a successful defence, and we are bound to uphold it. Moreover, defendant having succeeded in his defence, he is entitled to his costs in both courts.

Much as I regret upholding the defence to this action, I cannot agree that any other course is open to us. The issue which the District Judge framed was the issue which the parties intended to raise. Both parties contested that issue at the hearing, and the plaintiff's petition of appeal merely contests that issue on its merits.

The judgment appealed from must be set aside and plaintiff's case dismissed with costs in both courts.

Dias, J.—This is a money claim. The debt was incurred in 1883, and the action was instituted in 1890. Admitting the debt, the defendant pleads an informal plea of prescription. The plaintiff then amended the libel, setting up a written admission in 1889 to pay the debt. This amendment should have come by way of replication. The amendment took place in 1891, and the new matter imported into the libel was neither admitted nor denied. The pleaders on both sides did not well understand their work and the proper procedure to be followed. On the trial day the District Judge made a note to the effect that the issue to be tried was whether the claim is barred by prescription under section 8 of Ordinance 22 of 1871. The proctors on both sides seem to have acquiesced in this ruling of the Judge as to the issue to be tried.

It is hardly necessary that I should discuss the question whether the two letters relied on by the plaintiff are sufficient to take the case out of prescription. I agree with the rest of the Court that they are not, and think that though they admit the debt they do not contain an unqualified promise to pay, which is a necessary ingredient in an admission to take the case out of prescription. The conduct of the defendant is highly discreditable, but the law is on his side, and I am bound to give effect to it. I would set aside the judgment with costs.

———:o:———

Present:—Burnside, C. J., and Clarence and Dias, JJ.

(*June* 16 *and* 26, 1891.)

D. C. Kalutara, (Reference Case) No. 135. } Saunders v. Abeyratne.

Land acquisition—house or building—compensation—Ordinance No. 3 *of* 1876, *sections* 4 *and* 11—*procedure.*

The provisions of the Land Acquisition Ordinance No. 3 of 1876 are applicable for the purpose of acquiring only land, and not a house or building without the ground on which it stands.

In a case where the Government had acquired by private contract the site on which a building stood and subsequently instituted proceedings in the District Court under the Land Acquisition Ordinance for the purpose of acquiring the building itself—

Held that the reference was bad and the Court has no jurisdiction to entertain it.

The libel of reference as originally submitted purported to deal with the acquisition by the Govern-

ment of an allotment of land 17 perches in extent, but subsequently it was amended and it then described the property to be acquired as "a building standing on" the allotment of land in question.

It appeared that the Government acquired the land in question by private contract for the purposes of the railway extension, and subsequently wished to acquire also a building which stood thereon. The parties were not able to agree upon the amount of compensation, and these proceedings were accordingly instituted by Government.

The defendant in his answer stated that a portion only of the land and building were acquired by Government, and that he and his co-heirs "have sustained considerable damage by reason of this acquisition injuriously affecting the other portion of the building which have been rendered unsafe and uninhabitable owing to its close proximity to the railway line", and he pleaded "that the amount of compensation tendered by Government is not fair and reasonable". The answer prayed for a certain sum of money as damages in addition to the amount of compensation awarded by the Government Agent.

The matter was tried by the District Judge with assessors. The defendant's assessor sustained the contention of the defendant and awarded a higher compensation, but the Government assessor held that the compensation awarded by the Government Agent was correct, and the District Judge agreeing with him gave judgment accordingly.

The defendant thereupon appealed, and the Supreme Court set aside the judgment and sent the case back for further inquiry. Clarence, J., before whom the appeal was heard, after reciting that the property to be acquired was not properly identified in the libel of reference and that it appeared from the proceedings that the property concerned in the reference was in fact a building or portion of a building and that the libel was in the course of the proceedings amended to that effect, observed, *inter alia*, as follows:—"The compensation to which this land owner is entitled falls under sub-sections 1 and 3 of section 21 of the Ordinance. He is entitled to the market value of the bungalow and also to damages (if any) sustained by reason of the acquisition injuriously affecting the building. But this latter head of compensation has to be assigned without reference to any prospective damage arising from the use of the acquired land as part of a railway. Sub-section 4 of section 22 is express on that point and in fact merely follows the rule laid down by the majority of the appellate tribunal in *The Hammersmith and City Railway Company* v. *Brand*, L. R. 4 H. L. 171. We cannot, for instance, take into consideration any contingency for the main premises being hereafter damaged by vibration of the trains running on the railway within a few yards' distance or of any nuisance from the smoke or steam. But if the main premises have been impaired in value by the construction as distinguished from the use of the railway on the piece taken, that would be a proper head of damage to be assigned under sub-section 3 of section 21."

The case having gone back, further evidence was adduced on behalf of the defendant. But the Government assessor and the District Judge adhered to their former opinions, and the same order was again made. From this order the defendant appealed.

Canekeratne (*Dornhorst* with him) for defendant appellant.

Hay, A. S-G., for the plaintiff respondent.

Cur. adv. vult.

On June 26, 1891, the following judgments were delivered :—

Burnside, C. J.—It is necessary that I should state what are the true facts of this case, as there seems to have been a great deal of misunderstanding, not only as to the position of the Government, but also as to that of the appellant.

It appears that a strip of land belonging to the defendant, on which a small bungalow stood, had been obtained by the Government for railway purposes by mutual agreement between the defendant, the owner, and the Government; but for some reason, not very apparent, the bungalow itself was not included in this agreement. Subsequently the Government pulled down the bungalow, and the parties not agreeing as to its value, this libel of reference was filed by the Government Agent. The libel as originally filed referred to "land", but it was subsequently amended by restricting it to the bungalow only, and in my opinion the libel was thus rendered vicious. However, the defendent appeared and set up several claims for damages as follows. I quote from the answer :—That only a portion of *these* buildings and of the land upon which they stood was required by the Government, tha the defendant had sustained considerable damage by reason of this acquisition injuriously affecting his own part of the building which has been rendered unsafe and uninhabitable owing to its close proximity to the railway line—loss of rent from the whole of the buildings since the acquisition—by reason of the acquisition he has sustained loss—and he asks for damages to the extent of Rs. 2,400 in addition to the sum of Rs. 192·50 awarded as compensation for the portion of land acquired by Government. If this answer means anything, it is a claim for damages

resulting from the acquisition already completed by agreement injuriously affecting the remainder of the land, and I. don't think it possible to contend that the defendant in a suit like this can claim such damages. They ought to have been the subject of decision before the land had passed to the Government. As I have said, in constructing the railway, the building was pulled down, and *ex post facto* the Government now seeks to acquire it.

But the libel as I have said, is radically bad and incurable. The law gives the Government no right to acquire buildings without the land upon which they stand, and the libel should have been dismissed with costs, and the defendant left to his legal remedy against the Government for a trespass. Had the Government acquired the land in the usual way, the building would have of necessity gone with it; but having obtained the land without the building by agreement, there is no provision for obtaining the building alone. Both parties have treated the reference as a good one, and directed their attention to the proof of the actual measure of compensation. The defendant pressed his claim for damages by reason of the severance which had already been accomplished, and further that by the removal of the bungalow the other buildings would be exposed to the force of the wind, and would deteriorate in value by loss of rent. Now, even had the bungalow still been in existence, and this a proper suit to acquire the land on which it stood, I certainly fail to see how the probability of its subsequent removal could have been ground for compensation. The claim would come directly within the provisions of the Land Acquisition Ordinance, which prohibits taking into consideration "any damage which after the time of awarding compensation is likely to be caused by or in consequence of the use to which the land acquired will be put". The Government would have had a right to pull it down without further compensation, and even to this extent, in my opinion, the defendant had no claim for compensation in this suit, and the award of the District Judge on the material value of the building was sufficient.

Against this finding the defendant has appealed.

I do not see that we can confirm the District Judge's decree awarding any compensation, because all that the Court can award compensation for, is "land", and there is no suit regarding land.

I would dismiss the suit altogether, each party paying his own costs, for each has contributed to these misdirected proceedings, and leave them at arms' length to take such regular proceedings as they may be advised; but we are bound to express our regret that it is possible that such unnecessary expenditure should have been entailed both on the Government and the present individuals which mere ordinary attention would have avoided.

Clarence, J.—This reference as originally framed purported to deal with the acquisition by the Government of an allotment of land, 17 perches in extent. The libel of reference was afterwards amended, and as amended the property to be acquired was described as "a building standing on that allotment of land". That was *in facie* a good reference. When mention is made of a building being acquired under the Land Acquisition Ordinance, that means the land on which the structure stands *plus* the structure itself; but I now learn from the second judgment of the District Judge, which is in question on this apppeal, that the proceedings which have taken place have been of a very extraordinary character indeed. It is almost inconceivable, but it seems that the Government having acquired by private contract the site on which the bungalow stood, have afterwards resorted to the Land Acquisition Ordinance in order to acquire, as it was supposed, the right to deal with the structure itself. Incredible as it may appear, the judgment of the District Judge shews that this is what has happened, and this in fact is admitted.

I should have been glad if we could, by merely dismissing this appeal, and leaving parties to bear their own costs, have ended the matter, but we cannot do so, because only "land" can be acquired under the Ordinance, and there is no land left to acquire. We can only quash the whole proceedings and leave the parties to bear their own costs. When the first appeal was disposed of, all costs were left over as costs in the cause. Our order will now be that each party do bear his own costs throughout in either Court.

Dias, J.—The proceedings in this case are grossly irregular, as pointed out by my learned brothers. I would quash the proceedings, each party paying his own costs.

———:o:———

Present:—Clarence, J.

(May 21 *and June* 4, 1891.*)*

C.R., Batticaloa, No. 129. } Brown v. Kantappen and three others.

Cause of action—usufructuary interest in paddy land—Payment of grain tax by the usufructuary on seizure of land—Liability of owners to repay the amount of tax so paid—Implied promise to pay.

The defendants, owners of certain paddy land, to a share of the produce of which the plaintiff was entitled, having made default in payment of the grain tax due to Government, the land was seized by Government, when plaintiff paid the amount of tax due and released the land.

Held, that the law would imply a promise on the part of defendants to reimburse plaintiff their proportion of the tax so paid, and that the plaintiff could recover such amount in an action for money paid.

The original owner of certain paddy land gifted it to a certain party, from whom the defendants derive their title, subject to a condition that the plaintiff and his sister should have half of the "muttattu" share of the land. The defendants, as owners, cultivated the land for the years 1887 and 1888, but made default in the payment of the grain tax due under the Ordinance No. 11 of 1878. The Government then seized the land in respect of the tax, which amounted to Rs. 64·14, and advertised it for sale, when the plaintiff, in order to save the land from sale, paid the amount to Government.

The plaintiff now sued the defendants for recovering the amount as money paid on account of defendants. The Commissioner (F. J. De Livera) dismissed the plaintiff's action on the ground that the payment was not made "at the request of or for the benefit of the defendants".

The plaintiff thereupon appealed.

Dornhorst for plaintiff appellant.

Layard, A. A. G., for defendants respondent.

Cur. adv. vult.

On June 4, 1891, the following judgment was delivered :—

CLARENCE, J.—Upon the facts admitted by defendants, and those proved by plaintiff, I am of opinion that plaintiff is entitled to judgment. The defendants are the owners of the land, subject to the plaintiff's right to a certain share of the produce, which the parties style the "muttattu" share. The defendants not paying the tax due under the Grain Tax Ordinance 11 of 1878, the land was seized by the Government and advertised for sale, when plaintiff, in order to prevent the sale of the land, paid the tax, amounting to Rs. 64·14. I am of opinion that under these circumstances the law implies a promise upon the defendants' part to reimburse plaintiff. I think that the case falls within the principles laid down in *Exall* v. *Partridge* 8 T. R. 308, and *Johnson* v. *Royal Mail Steam Packet Co.* L. R. 3 C. P. 45. A suggestion, I cannot call it more, appears to have been thrown out for the defence, that defendants deliberately abandoned this land as not worth cultivating or paying tax for. I do not find it necessary to consider how far such a circumstance, had the fact been established, would have gone to negative the inference of an implied promise to reimburse plaintiff, because no evidence was adduced for the defence to establish any such circumstance. All that is disclosed is, that this is paddy land in which defendants and plaintiff were interested, and *prima facie* I take it that the land which appears to have been in cultivation up to the year for which plaintiff paid tax, was worth saving.

The judgment will be set aside, and the case sent back to the Court of Requests, in order that an apportionment may be made showing the proportion of the Rs. 64·14 which plaintiff is entitled to recover from defendants, for part of the Rs. 64·14 is to be considered as paid on plaintiff's own account. Plaintiff will have his general costs of suit up to this date, including his costs of this appeal, but excluding the costs of a postponement made on his account in which he was specially cast by the Commissioner at the time.

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Present:—CLARENCE & DIAS, JJ.

(August 14 and 18, 1891.)

D. C., Badulla, No. 115. } SEVALINGAM KANGANY v. KUMARIHAMY.

Civil Procedure—Action to recover debt due by an intestate—Administration—Civil Procedure Code, secs. 547 & 642—Interpretation.

Sec. 547 of the Civil Procedure Code, disallowing actions for the recovery of any property belonging to the estate of a deceased person exceeding in value Rs. 1,000, unless probate or administration has been taken out, refers only to actions on behalf of the estate—actions brought to recover for the estate and those entitled to it anything claimed as belonging to or due to the deceased person, and is inapplicable to actions brought by a creditor to recover a debt due from the deceased person.

The plaintiff was creditor of one Loku Banda upon a mortgage bond. Loku Banda having died intestate, the Court, on application by plaintiff under the provisions of sec. 642 of the Civil Procedure Code, appointed the defendant to represent Loku Banda's estate for the purposes of action to be brought by plaintiff upon the mortgage bond. The plaintiff accordingly brought this action, and the defendant being in default of appearance the case was heard *ex parte* and a decree *nisi* was entered for the amount claimed. But on the day fixed for shewing cause against the decree *nisi* the defendant appeared, and opposed the decree being made absolute, on the ground that the estate of Loku Banda was above the value of Rs. 1,000. Upon this, some evidence was taken as to the value of the estate, and the District Judge (G. A. Baumgartner), finding the estate exceeded in value Rs. 1,000, held that sec. 642 of the Code did not prevent the full operation of sec. 547, and that where the value of the whole estate was found to be above the required value, administration must be taken out to the estate, even for the purpose of recovering a mortgage debt due from the deceased

person, and he proceeded to "absolve defendant from the instance with costs".

The plaintiff thereupon appealed.

vanLangenberg for plaintiff appellant.

Cur. adv. vult.

On August 18, 1891, the following judgments were delivered :—

CLARENCE, J.—This is an action by a mortgagee to recover the mortgage debt. The mortgagor having died intestate, and no letters of administration given or taken out by any person, plaintiff accordingly seeks to avail himself of the procedure provided by sec. 642 of the Procedure Code. Upon the mortgagee's application by petition under that section, the District Judge appointed the widow of the mortgagor to represent the estate of the mortgagor for the purposes of the action, the petitioner stating that the value of the mortgaged property is under Rs. 500. The mortgagee then filed his plaint against the representative so appointed, and prayed for judgment on the mortgage. The defendant so sued being in default, the District Judge entered a decree *nisi* for plaintiff, but afterwards, upon plaintiff's application to have that decree made absolute, the defendant appeared, and opposed the application, taking up the ground that the mortgagee's estate is over Rs. 1,000 in value, and contending that that being so the Court was precluded by sec. 547 from entertaining the mortgagee's present proceeding, no administrator having been appointed. The District Judge upheld the objection, and the plaintiff appeals.

The District Judge has entirely misapprehended the effect of sec. 547. The District Judge in his judgment interprets that section as follows:—

"Sec. 547 says that no action shall be maintainable for the recovery of a debt from an intestate's estate without administration if such estate exceed Rs. 1,000 in value."

The section does not say that. What the section does say is, "no action shall be maintainable for the recovery of any property belonging to or included in the estate or effects of any person when the estate exceeds Rs. 1,000, unless probate of a will or letters of administration have been taken out". This obviously refers to actions on behalf of the estate, actions brought to recover for the estate, and those entitled to it something claimed as belonging to or due to the deceased person. The section has nothing whatever to do with actions by a creditor to recover a debt due from the deceased person. This was the only ground of opposition noted as shown by defendant in answer to plaintiff's motion to have the decree *nisi* made absolute.

I have looked through the paper-book, but though I find a journal entry that a decree *nisi* was entered up on April 14, I cannot find the decree itself. The order in appeal may be simply to set aside the order of the District Court appealed from, and remit the case to the District Court for further proceedings in due course. The District Judge will of course bear in mind the provisions of sec. 201 with regard to mortgage decree.

The defendant will pay the plaintiff's costs of the opposition in both Courts.

In setting aside the judgment entered up by the District Judge we may point out that since the enactment of the Procedure Code a judgment "absolving the defendant from the instance" is not judgment that can be passed.

DIAS, J., concurred.

———:o:———

Present:—BURNSIDE, C. J., and CLARENCE & DIAS, JJ.

(June 30 *and July* 22, 1891.*)*

D.C., Batticaloa, No. 108. } KANAPADIAN v. PIETERSZ.

Civil Procedure—Pleading—Averments in pleadings—Action of title to land—Necessary averments in plaint—Civil Procedure Code, sec. 40—List of documents annexed to plaint—Admissibility of—Evidence.

Under sec. 40 of the Civil Procedure Code, in an action for title to land, it is not enough merely to aver ownership, but the pleadings must particularly disclose the title by which such ownership is claimed.

Where a plaintiff, in an ejectment suit, did not set forth in the plaint the facts relied on as establishing his title or refer to any documents for that purpose, and where he subsequently filed a list of documents relating to his title,—

Held, that the documents were inadmissible in evidence in the absence from the plaint of allegations as to title, to which they were applicable,

This was an action in ejectment. The facts of the case are sufficiently disclosed in the judgment of Clarence, J.

The plaint alleged that "he was at the time of the grievances hereinafter complained of, and still is, the lawful owner and proprietor of an undivided share cultivated in tattumaru in extent 25 marcals out of the paddy land called Pariakalmunai Veli at Kalmunaikandam in Batticaloa within the jurisdiction of this Court, bounded," &c. It proceeded to aver that the plaintiff "cultivated the said 25 marcals of the land for 1889, and raised a crop, and that the defendant, well knowing the premises did in the month of May, 1889,

unlawfully enter into the said land and remove the crop raised, and unlawfully ousted the plaintiff", and it prayed for declaration of title, and for ejectment and damages.

The answer denied that plaintiff was owner as alleged, and denied the trespass. The answer then proceeded to aver title in defendant himself, and possession on his part.

The plaint as originally filed did not contain a list of documents, but subsequently plaintiff moved to be allowed to amend the plaint by inserting such a list, and the motion, though opposed by defendant, was allowed by the District Judge. The list of documents so added contained *inter alia* a deed of transfer in plaintiff's favour, and a deed in favour of the grantor to plaintiff.

At the trial the plaintiff called certain witnesses, and tendered in evidence the documents in question, which were, however, objected to on the ground that the plaintiff's title was not disclosed in the plaint. The District Judge upheld the objection and rejected the documents, and in the result dismissed the plaintiff's action. The plaintiff thereupon appealed.

Dornhorst for plaintiff appellant.

Layard, A. A. G., for defendant respondent.

Cur. adv. vult.

On July 22, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—This judgment is in my opinion right, and should be affirmed.

The plaintiff alleged that he, being the owner and in actual possession of an undivided share in certain land cultivated in tattumaru, and the defendants reaped the crops, and keeps the plaintiff dispossessed. The defendant denied the plaintiff's title and the plaintiff's possession.

These are distinct issues on which the burden was on the plaintiff. To get ejectment and a declaration of title, he was bound to prove good title. To get ejectment he was bound to prove an ouster from actual possession, unless the defendant could show title. It is unnecessary that we should consider the pleadings by the light of the Code, because it is clear that the burden of the issues was on the plaintiff, and even with his documents subsequently inserted in his list of documentary proof, he has clearly failed to shew title in himself as a tattumaru owner, and he was clearly disproved that he was in sole and undisputed possession, because he himself says the defendant cultivated the land last year and took the crop. He has therefore failed to prove title. and he has failed to prove a *de facto* possession, which put the defendant to any proof of title in himself, and the action has been properly dismissed with costs. The plaintiff has chosen to state his cause of action in a particular way, and I see no reason why he should be allowed to begin again.

I would affirm the judgment.

CLARENCE, J.—In this action the plaintiff sues to recover from the defendant possession of an undivided share of land ; but the action is in the nature of an action to eject, and not a merely possessory action. Plaintiff, on the strength of an averment that the title is in him, and that defendant is in possession, asks to be declared entitled, and to be placed in possession. The action was instituted in November, 1890, and the plaint avers that plaintiff was in May, 1889, and still is the owner of the share in question, and that defendant then unlawfully took the crop which plaintiff had raised, and continues to keep plaintiff dispossessed.

The proctors for the parties as well as the District Judge seem to have misapprehended the nature, and effect of the New Procedure Code as to pleadings.

The plaint averred merely that plaintiff had title in May, 1889, but did not disclose how that title arose. In this respect the plaint was defective. It is plain that where title to land is a circumstance upon which plaintiff bases his claim to relief the intention of the Code is, that that title should be disclosed in the plaint, so that the defendant may have notice of the case which he has to meet. Sec, 40 of the Code requires the plaint to contain "a plain and concise statement of the circumstances constituting each cause of action and where and when it arose". This amounts to much the same as the requirement in Rule 4 under Order xix. under the Judicature Act, that "a pleading shall contain as concisely as may be, a statement of the material facts on which the party pleading relies", on which it has been held that a defendant sued on the strength of a plaintiff's title to land is entitled to have that title disclosed, so that the defendant may know what case he has to meet. See *Philips* v. *Philips*, L. R. 4 Q. B. D. 127. Sec. 51 of our Code goes on to require that where the plaintiff relies on any documents, other than a document actually sued on, as evidence in support of his claim, he shall "enter such documents in a list to be added or annexed to the plaint". The plaintiff here did not append any such list of documents to his plaint.

The defendant might have asked to have the plain taken off the file as not disclosing the title set up. Defendant, however, took no such course, but answered traversing plaintiff's averments as to ownership and possession, and setting up a specific title in himself.

Thereafter, in January, 1891, plaintiff moved to be allowed to append to his plaint a certain list of documents. Defendant opposed the application, but

the District Judge allowed it. I think that the application ought not to have been allowed, for the simple reason that the plaintiff had not disclosed what was the title which plaintiff was setting up.

The case next came to a hearing, and at the hearing the plaintiff called some witnesses and tendered in evidence the documents comprised in the list already mentioned. Defendant's proctor objected to the whole of that evidence, both oral and documentary. The District Judge upheld the defendant's objection so far as concerned the documentary evidence, and thereupon dismissed plaintiff's action with costs. Plaintiff appeals.

The defect in plaintiff's proceedings was that until plaintiff's advocate proceeded to open his case at the hearing, the defendant so far as appears from the record, had no notice whatever of the facts relied on by plaintiff as establishing plaintiff's title. Plaintiff's counsel pressed in appeal the circumstance that the District Court had already allowed plaintiff's application to append the list of documents to his plaint, and that defendant had not appealed against that order. In reply to this it is sufficient to say that the list of documents was meaningless in the entire absence from the plaint of any averments disclosing the steps of plaintiff's alleged title. Defendant, however, instead of answering plaintiff's averment of title with a traverse, should have taken objection to the plaint at once.

I would quash all proceedings subsequent to the plaint, and give plaintiff leave to amend his plaint. No costs on either side.

DIAS, J.—In this case I agree with my brother Clarence that the plaintiff should have an opportunity to amend his plaint. Under sec. 40 of the Code the plaint should contain a plain and concise statement of the circumstances constituting each cause of action, and when and where it arose; and by sec 51, if plaintiff relies on any document, other than the one actually sued on, as his evidence in support of his claim, he should enter such document in a list to be annexed to the plaint. No such list was annexed here; but in the progress of the suit the District Judge allowed the plaintiff to annex to the plaint a list of documents, but in the absence of any allegation in the plaint showing the applicability of the documents to the title set up by the plaintiff the subsequently annexed documents did not place the plaintiff in a better position. The Code requires the plaintiff to give the defendant full notice of the case which is intended to be set up against him. Both parties blundered in the matter, the plaintiff in not complying with the requirements of the Code, and the defendant in not objecting at the right time. In these circumstances I think the plaintiff should have an opportunity to amend.

Set aside accordingly, and no costs either side.

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Present:—BURNSIDE, C. J., and CLARENCE, J.

(August 25 *and September* 11, 1891.*)*

D. C., Jaffna, No. 22,152. } ARUNASALAM v. RAMANATHAN.

Civil procedure—Prescription of action—Objection ore tenus on ground of prescription—Right of the Court to raise such objection mero motu—Pleading—Civil Procedure Code, sec. 44, *and sec.* 46, *proviso* 2, *para* (*i*)—*Claim in execution—Effect of non-claim—Civil Procedure Code, sec.* 247.

Prescription may be pleaded to an action *ore tenus* at the trial subject to the question of costs.

After the enactment of the Civil Procedure Code, it is competent for the Court, when the existence of the statutory bar is made apparent at the hearing of an action, to recognize the bar *mero motu*, and refuse to proceed with the action.

In the case of a claim to property seized in execution,—

Held, that the order of the Court on the claim binds only the parties to the claim proceedings; but persons who prefer no claim in execution are at liberty to resort to the regular process of an action at law in respect of any title which they may have to the property seized in execution, irrespective of the provisions of sec. 247 of the Civil Procedure Code.

Held, that when one person for himself, and "on behalf of" others claim property seized in execution, the latter are not parties to the claim proceedings, and are not bound by any order made therein.

The plaintiffs in this action, five in number, alleging title to certain lands, averred that the defendants, six in number, "combined and colluded together, and the 3rd defendant having obtained a judgment under No. 17,070, C. R., Jaffna, fradulently and collusively against the 4th, 5th, and and 6th defendants caused the said lands to be seized, and sold under the writ in the said case on or about 25th February, 1889, and the 2nd defendant became the purchaser thereof"; and "that in furtherance of the said collusive proceedings the 1st defendant, who is brother of the 2nd defendant instituted a case against the latter in case No. 21,743 before this Court, obtained a fraudulent and collusive judgment, and sued out execution, and on or about the 22nd December, 1890, caused the said lands to the seized by the Fiscal". The plaintiffs prayed for declaration of title and for possession and that the sale in favour of 2nd defendant be set aside.

The action was instituted on 9th March, 1891. The answers of the defendants in substance denied the

allegations of the plaint and set up title in the execution debtors in the previous action, but raised no question of prescription.

At the trial the proceedings commenced with this record of the District Judge (P. W. Conolly):—"The Court intimates its opinion that the plaintiffs cannot succeed in this action, the same not having been preferred within 14 days from the date of the order disallowing the 1st plaintiff's claim preferred under sec. 241 of the Civil Procedure Code in case No. 21,743 of this Court to the two lands now in question, and calls on the plaintiffs to shew cause why this action should not be dismissed with costs."

The plaintiffs' counsel, thereupon, submitted certain considerations against such an order, and in reply to the Court admitted that the 1st plaintiff preferred a claim to the Fiscal when the lands were seized in execution in case No. 21,743, that the Court after inquiry disallowed the claim on 17th February, 1891, and that the present action was not instituted within 14 days from the date of that order.

The defendants then tendered in evidence a certified copy of the claim preferred by the 1st plaintiff in case No. 21,743, with copy of the proceedings of the inquiry into that claim, and of the order of the Court thereon.

The District Judge thereupon dismissed the plaintiffs' action with costs, holding that the action was prescribed, and that in view of sec. 46 of the Civil Procedure Code, it was competent for the Court itself to raise the objection as to the action being barred; and with regard to the argument that the order on the claim bound only the 1st plaintiff, he alone having been party to the claim proceedings, the learned District Judge observed as follows: —"I cannot agree to this. The other plaintiffs were parties, for the 1st plaintiff, in making his claim to the Fiscal as required by sec. 241, claimed for himself and the other plaintiffs. Besides, when the Fiscal seized the lands in question, that was due notice to all concerned, and interested to prefer their claims. If they do not, they must take the consequences. No doubt the 2nd, 3rd, and 4th plaintiffs did not appear before the Fiscal. As they were females, they left the matter to the male claimant, the 1st plaintiff. It has been held in India that if a person whose property is attached does not object under sec. 278 of the Indian Code (corresponding to our sec. 241), he cannot bring a regular suit to have it declared that the property belongs to him, and not to the judgment debtor. See *O'Kinealy* p. 293".

The plaintiffs appealed from this judgment.

Ramanathan for plaintiffs appellant.

Cur. adv. vult.

On September 11, 1891, the following judgments were delivered:—

BURNSIDE, C. J.—I see no reason to dissent from the judgment of the learned District Judge or from that of my brother Clarence, that it was competent to the District Judge, on the facts of this case, to call attention *mero motu* to a statutory bar to the action which has not been pleaded, but the existence of which was admitted, and to accept the defendants' *viva voce* objection to the suit proceeding further, and to dismiss the action.

What I wish to guard against is any decision that the Judge may *mero motu* apply any statutory bar, of the existence of which he may be previously cognisant, to a plaint in which the bar does not appear, and then reject the plaint under sec. 46, by which power is given to reject the plaint, where the action appears from the statement in the plaint to be barred by any positive rule of law. In my opinion the plaint itself must disclose the statutory bar before the power of rejection can be exercised. I quite agree, and I have already so held, that if a person elects to prefer a claim under sec. 241 of the Code to land seized in execution as not liable to be sold, that order is conclusive against all parties to it, and it is not competent to discuss its merits or to take objection to it, unless an action is brought with fourteen days, as provided by sec. 247 of the Code. But the order is in no way binding on any party who took no part in the claim: such party is at liberty to resort to the regular process of an action at law in respect of any title which he may have or claim to the property seized in execution.

The order therefore in this was binding on the 1st plaintiff, and is *res judicata* against him, but not against the other plaintiffs, who were strangers to the claim.

The learned District Judge's judgment must therefore be affirmed, so far as it affects the 1st plaintiff, with costs of this appeal, and be set aside as against the others and the case sent back, in order that the other plaintiffs may be at liberty to go on with the action in which their title should be separately adjudicated on. All costs to abide the event.

CLARENCE, J.—Plaintiffs aver that by inheritance from one Sinnetamby and Valliar, his wife, they are entitled to certain lands. Plaintiffs also aver a title by prescription. The grievance of which plaintiffs complain in this suit is trespass against plaintiffs' ownership, in that certain of the defendants caused these lands to be seized by the Fiscal under certain judgments obtained by them against other of the defendants, and the issue which plaintiffs seek to raise is, whether the lands in question are the property of the plaintiffs or of some of the defendants.

The plaint avers the judgment, under which the lands were seized, to have been obtained "fraudulently and collusively". We need take no further notice of that averment, which, as plaintiffs' suit is framed, is entirely irrelevant. If the lands are assets of the judgment debtors, plaintiffs can have no concern with any question as to the *bona fides* of the litigation out of which the judgments arose. The plaint avers that in execution of a judgment obtained by the 3rd defendant against the 4th, 5th, and 6th defendants, these lands were seized by the Fiscal, and sold to 2nd defendant, and that thereafter, in execution of another judgment obtained by the 1st defendant against the 2nd defendant, these lands were seized by the Fiscal. Plaintiffs pray for a declaration that the lands are plaintiffs' property, and that plaintiffs may be quieted in possession. They also ask that the sale to 2nd defendant be set aside.

The first three defendants only have answered, and they traverse plaintiffs' averments of title and set up title in the other defendants.

On the case coming to a hearing, the District Judge pointed out that this action had not been instituted within fourteen days of an order of the District Court made in case No. 21,743, D.C., Jaffna, (the case, secondly above referred to, in which 2nd defendant was sued by the 1st defendant) disallowing a claim to these lands preferred by the 1st plaintiff. The pleadings are silent as to this claim; but it was admitted at the hearing that in case No. 21,743 the 1st plaintiff made a claim to the lands in question, and that the District Court made an order disallowing that claim more than fourteen days before this suit was instituted. The District Judge, on this ground, dismissed plaintiffs' suit with costs, and the plaintiffs appeal.

The question is, whether plaintiffs' suit is barred by sec. 247 of the Procedure Code.

In the first place, we have to consider whether, assuming the plaintiffs' case to be obnoxious to that section, the District Judge was right in applying the provisions of the section so far as to bar the suit, no objection to that effect having been raised upon the defendants' pleadings. Upon this point I think that the District Judge's ruling is right. Prior to the enacting of the Civil Procedure Code, we followed in Ceylon the English rule that the statutory bars provided by the Legislature are matters of which a defendant may, or may not take advantage at his own discretion, and are consequently matters which the defendant should himself set up if he desires to avail himself thereof. The Civil Procedure Code—well or ill advisedly we need not consider—appears to be framed upon the principle of regarding these statutory bars as absolute bars which every plaintiff has to meet. Sec. 44 declares that "if the cause of action arose beyond the period ordinarily allowed by any law for instituting the action, the plaint must show the ground on which exemption from such law is claimed". By sec. 46 the Court is allowed to reject a plaint" when the action appears from the statements "in the plaint to be barred by any positive rule of law." Taking all this in connection with the declaration made in sec. 247 as to claims in execution, that an order made under secs. 244, 245, 246 is, subject to the result of an action brought within fourteen days, conclusive, I think that, upon its coming to the knowledge of the District Judge at the hearing that such an adverse order had been made more than 14 days before the institution of the action, the District Judge would be warranted in declining to try the merits—warranted in thereupon dismissing the suit. Sec. 44 seems to regard it as a plaintiff's duty, when a *prima facie* statutory bar exists, to disclose that circumstance and aver the means by which (if possible) it is to be overcome. Where, as here, a plaintiff by suppressing in his plaint the previous history of his contention with his defendant, conceals the existence of the bar, it seems to me to be in accordance with the intention of the Code, that if, when the case comes to a hearing, the existence of a statutory bar is made apparent, the District Judge is entitled *mero motu suo* to recognize the bar, and unless the plaintiff is in a position to avoid it, may refuse to proceed further with the plaintiff's action.

But to sustain the order now appealed from, it is not necessary to go to this length. Prescription may be pleaded *ore tenus*, subject of course to the question of costs; and it is plain from the District Judge's note in this case that upon his bringing to the notice of parties (in consequence perhaps of his own personal recollection of the business of his Court) the existence of the previous order, the defendants at once took their stand upon the statutory bar and sought to avail themselves of it.

Therefore, subject to the question of costs, we have to consider, upon its merits, the issue, whether the order, which admittedly was made in the case No. 21,743, is an order which bars the present action. We have the order itself in evidence. The land having been seized under the 1st defendant's judgment against the 2nd defendant, the present 1st plaintiff claimed the land, and the District Judge after inquiry disallowed that claim. This was an order made pursuant to sec. 244; and an order made under that section is (subject to the result of an action brought within 14 days) conclusive. Plaintiffs' counsel desired, upon the argument of the appeal, to discuss the propriety of the order, and pointed out to us that the District Judge's note, of his reasons for the order, stated, the order as based on the claimant not having satisfied the Court that the land when seized was in his possession, where-

as it was contended the onus was on the execution creditor of showing that the land was in the possession of the execution debtor. But as we intimated at the argument, we cannot enter upon any question as to the propriety of the order viewed in regard to the materials before the Court when it was made. Sec. 247 renders the order conclusive, unless an action shall have been brought within 14 days, which has not been done.

But there is a further question,—whether the order, though estopping the 1st plaintiff from maintaining this action, touches the other plaintiffs. If the other plaintiffs derive their title through the 1st plaintiff, they are of course equally concluded by the order, but it is at any rate not clear that the title which they set up is so derived. The District Judge, however, with reference to this point, has held that the order concludes the other plaintiffs also. That ruling we cannot, I think, support. It is true that the 1st plaintiff, when claiming the land, proposed to do so on behalf of himself and the other plaintiffs; but we cannot recognize his act as binding on them in the absence of a properly constituted representation, as, for instance, by power of attorney. The 2nd, 3rd, and 4th plaintiffs are in this position—they made no claim when the land was seized under the 1st defendant's judgment against 2nd defendant.

Upon a consideration of the provisions of the Code with regard to seizures, and sales of land in execution of judgment, I take it to be clear that where a judgment creditor seizes and sells, as the land of his judgment debtor, land the title to which is not in the judgment debtor, but in a third person, the sale by Fiscal and the conveyance to a purchaser will not of themselves deprive that third person of his title. See, for instance, sec. 284, which provides for the setting aside of a sale, on purchaser's petition, upon the ground of no title in the judgment debtor. If the conveyance when granted would avail against all other title, there would be no need for the purchaser to object to the completion of the purchase on such a ground. I I take it, therefore, that if the judgment creditor seizes the judgment debtor's land to which some third person has title and that third person remains silent and prefers no claim under the summary procedure provided by the Code, he will still be at liberty to assert his title if the purchaser thereafter seeks to interfere with his ownership. The effect of the enactment seems to be, that if a third party having interest elects to prefer a claim before the Fiscal, he thereby incurs a risk of being concluded by an adverse order, unless within 14 days thereof he brings a formal action. But if he chooses to lie by and take no step under the summary procedure, his right remains to him unaffected by any Fiscal's sale which may take place.

For these reasons, it seems to me, that although 1st plaintiff is concluded, so far as his interest is concerned, by the order in case No. 21,743, the other five plaintiffs are not concluded by that order.

I therefore think that we should affirm the judgment appealed from, so far as it dismisses 1st plaintiff's action, but without costs, except costs of this appeal, and that with regard to the other plaintiffs we should set aside the judgment, and send the case back to the District Court for further proceedings in due course, leaving all costs as between the defendants and the plaintiffs, other than first plaintiff to be costs in the cause.

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Present:—CLARANCE, J.

(July 16 *and* 22 *and August* 6, 1891.*)*

Municipal Court Galle, No. 1431. } BOGAARS v. KARUNARATNE.

Criminal procedure—revision—Application for Revision of an appealable order—Criminal Procedure Code, sec. 426.

The Supreme Court would not in general interfere by way of revision, under sec. 426 of the Criminal Procedure Code, in cases where an appeal might be taken.

This was a prosecution under the Cemeteries Ordinance, No. 10 of 1854, for burying a dead body in unauthorised ground within the town of Galle. At the hearing, which took place on June 13, 1891, it was admitted that there was no general cemetery in Galle, and after some argument, as to whether under that circumstance there was an offence committed, the Police Magistrate held, that the defendant had committed no offence, and acquitted him.

On July 16, 1891, the Attorney-General applied to the Supreme Court for revision of the Magistrate's order, and notice having been directed to be issued, the matter came on for argument on July 22, 1891.

Hay, A. S. G., for the Crown.

Seneviratne for the defendant.

Cur. adv. vult.

On August 6, 1891, the Supreme Court disallowed the application and delivered the following judgment:—

CLARENCE, J.— I see no reason why I should in this case interfere, by way of revision, with the Magistrate's order. I do not in general consider it proper to interfere by way of revision in cases where an appeal might have been taken. In this case the Attorney-General, who asks, to have the order revised, might himself have appealed. Upon the point of law suggested in the

Magistrate's note, I express no opinion. No evidence was adduced before the Magistrate, and, so far as appears, the Proctor for the prosecution did not offer any.

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Present:—Burnside, C. J., and Clarence and Dias, JJ.

D C. Colombo, No. 3,245. } Don Nicholas v. Mack.

Action against administrator—plea of plena administravit—*pleading—burden of proof—evidence—procedure.*

In an action against an administrator, who pleads *plene administravit*, the plaintiff may either confess the plea and take judgment of assets *quando acciderit*, or he may take issue on the plea, in which case the burden of proving assets is on him.

The plaintiff sued the defendant as administrator of the estate of a deceased person for the recovery of a certain sum of money alleged to be due on a planting agreement entered into by them with the deceased. The defendant in his answer, among other things, denied the claim and pleaded *plene administravit*. The plaintiff filed a replication, in which he took issue on the plea of *plene administravit*, and further pleaded that a certain land had vested in the defendant as administrator and had not yet been transferred to the heirs in due course of administration. The defendant then rejoined, denying that the land referred to had vested in him, and stating that, before the commencement of this action, the defendant, having recovered all assets of his intestate and paid all debts whereof he had notice, and without notice of plaintiff's claim, had delivered possession of the said land to the heirs of the deceased, who were ever since in possession of the same.

At the trial no evidence was called on either side, but it was agreed that no conveyance was executed for the land in favour of the heirs. The District Judge (*O. W. C. Morgan*) dismissed the plaintiff's action on the ground that there were no assets in the hands of the administrator, and as the argument that certain properties had not been conveyed by the defendant to the heirs, he said: "This is a matter between the heirs and the administrator. The heirs do not complain, and are, I presume, satisfied to possess the properties without any conveyance from the administrator."

The plaintiff thereupon appealed.

Browne (*Pereira* with him) for plaintiff appellant.

Wendt for defendant respondent.

Cur. adv. vult.

On September 29, 1891, the following judgments were delivered:—

Burnside, C. J.—This appeal must be dismissed with costs. The plaintiff on the defendant's plea of *plene administravit* could have taken judgment for his claim with costs out of assets *quando acciderit.* He, however, chose to take issue on the plea and assume the burden of proving assets, and he has not done so. It is not possible to use the defendent's pleading in denial of plaintiff's claim as any admission of assets, in face of the direct plea of *plene administravit*; because if there were such an unqualified admission, it would be matter of estoppel, and the plaintiff, without replying estoppel, cannot take any advantage of it. The plaintiff did not attempt to give any direct evidence of assets, but simply relied on the record.

Clarence, J.—I think that this case should go back to the District Court for such proceedings as the parties may be advised to take. The defendant has put plaintiff's to the proof of the debt and has further pleaded *plene administravit.* There are two courses open to a plaintiff suing an administrator when the administrator pleads *plene administravit.* He may confess the plea and take judgment of assets *quando acciderit*, or he may take issue on the plea, in which case the burden of proving assets is on him. In the present case, the plaintiff before he would have any judgment, must prove the debt also. These parties have wasted pleadings in a replication and rejoinder. The defendant's rejoinder *in facie* is self-contradictory. He avers in one breath that a certain piece of land never vested in him as administrator and that he conveyed it to the heirs. The parties do not seem to have correctly understood the procedure in such a matter. Moreover, the District Judge, although there is no note of any documentary evidence being admitted at the hearing before him, seems in point of fact to have informed his mind by a reference to the proceeding in the testamentary matter of the administration. If it be the fact that there is land which the intestate owned at his death, and which consequently became vested in the administrator, and if it be further the fact that the administrator, though he purported to distribute that land to certain of the heirs, has not yet executed any conveyances in their favour, then that land is, in my opinion, still land that can be reached under a judgment against the administrator. I dissent from the learned District Judge's ruling as to this. I would set aside the judgment and give no costs of the appeal to either side.

Dias, J.—This is an action against an administrator to recover a sum of money due to the plaintiff from the intestate. The defendant pleaded *plene administravit*, and the plaintiff joined issue. On the pleadings the onus was on the plaintiff to prove assets, but he has adduced no evidence, apparently relying on the first paragraph in the rejoinder, in which the defendant admits that he transferred a land of the

intestate to his (the intestate's) heirs. That is no admission of assets to entitle the plaintiff to succeed on the issue of assets or no assets. If the alleged admission had that effect, the plaintiff should have moved for judgment on the pleadings. They did nothing of the kind, for the simple reason that they could not. I see no reason why the case should go back for further proceedings. I dismiss the appeal with costs.

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Present:—Burnside, C. J., and Dias, J.

(*February* 15 *and* 16, 1889.)

D. C. Negombo, No. 15,408. } Fernando v. Fonseka.

Registration—deed of gift—valuable consideration—adverse interest—priority—Ordinance No. 8 *of* 1863, *section* 39.

Under section 39 of Ordinance No. 8 of 1863, a deed of gift, not being a deed for valuable consideration, does not, by reason of prior registration, obtain priority over a deed previously executed.

The plaintiff sued defendant in ejectment, claiming title to a certain land upon a deed of gift from his father, who had purchased it from the original owner. The defendants claimed under a deed of lease executed, previous to the sale to plaintiff's father, by the original owner for 22 years, which had not expired at the date of the action. The deed of gift was registered prior to the lease. The District Judge dismissed the plaintiff's action on the ground that the plaintiff's father, the donor, had notice of the lease and that prior registration could not give to the plaintiff a better title than his donor had. The plaintiff appealed from this judgment.

J. Grenier for plaintiff appellant.

Dornhorst for defendants respondent.

Cur. adv. vult.

On February 26, 1889, the following judgments were delivered:—

Dias, J.—The facts of this case are these. The admitted owner of the land, one Julis Fernando, by a deed of 15th May, 1876, leased one-half of the land to the first defendant and another for twenty-two years, and by a deed of 29th May, 1877, the two lessees subleased to Gordianu Fernando, who is the father of the plaintiff, for five years, which expired in 1882; and on the 4th September, 1877, the owner or lessor sold the land to the plaintiff's father, who, in December, 1877, gifted the land to the plaintiff, who is a minor. The lease of 1876 was registered, but it was registered after the plaintiff's deed of gift; and the question is, whether the plaintiff's deed is entitled to preference over the first defendant's deed of 1876. The District Judge dismissed the suit, as appears to me, on erroneous grounds. First, he seems to have thought that the plaintiff's father, when he took a conveyance from Julis, had notice of the previous lease; and secondly, that the plaintiff's father could not convey to the plaintiff more than the father himself had. The answer to the first objection is that notice to the father is not notice to the son; and with regard to the second objection, the answer is that the effect of registration is to give the deed a wider operation than the grantor himself could give to it. This question has been fully gone into in a case reported in 8 S. C. C. 111, and I adhere to my opinion in that case. At the hearing of this appeal, Mr. Dornhorst, for the respondent, contended that the plaintiff is not entitled to the benefit of section 39 of the Registration Ordinance (No. 8 of 1863), as his interest is not founded on a valuable consideration. The plaintiff is a mere volunteer, his father conveyed the land to him as a gift, and the object of the Ordinance manifestly is to give a statutory title to those only whose claims are founded on valuable consideration. Valuable consideration is a well known term with a well defined meaning—it is such as money, marriage, or the like, which the law esteems as an equivalent given for the grant. (Brown's *Commentaries*, p. 480.) The objection, in my opinion, is fatal to the plaintiff's case; but as it was taken for the first time in this Court, I will affirm the judgment with costs, except the appeal costs, which shall be borne by the parties respectively.

Burnside, C. J.—As my learned brother Dias and I both agree on the point on which the judgment should be affirmed, I am content to express my concurrence in the judgment of the Court on the point only; but I must not be held as acquiescing in the other propositions of my learned brother.

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Present:—Clarence and Dias, JJ.

(*June* 2 *and* 23, 1891.)

D. C. Kalutara, No. 74. } Fernando v. Veerawagu Pulle.

Civil procedure—splitting of causes of action—seizure of property under writ—claim in execution—Civil Proedure Code, section 34.

Section 34 of the Civil Procedure Code enacts "Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action * * * If a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.* * *"

Under writ of execution issued by defendant against a third party, the Fiscal seized certain moveable property, part of which was claimed by plaintiff and another jointly, and part by plaintiff alone. A claim having been made in due course, the District Court rejected the same. Thereupon plaintiff and his co-owner brought one action in respect of the property jointly claimed by them, and subsequently the plaintiff alone brought the present action in respect of the property claimed by himself.

Held that the present action was rightly brought, and the claim was properly not included in the previous action, and that therefore there was no splitting of the cause of action, so as to bring the case under the operation of section 34 of the Civil Procedure Code.

The defendant in this action as writ-holder in a previous action caused certain movable property to be seized as property belonging to his debtor, but the plaintiff and a brother of his claimed certain portion of the property as belonging to them jointly, and the plaintiff also claimed another portion as belonging to him separately. The claims having been referred to the District Court, and having ultimately been disallowed, the plaintiff and his brother brought one action, No. 73 of the District Court of Kalutara, under section 247 of the Civil Code, in respect of the property claimed as jointly belonging to them, and subsequently the plaintiff brought this action himself in respect of the property claimed as separately belonging to him.

No objection based on section 34 of the Civil Procedure Code was taken by the defendant in the pleadings, but at the trial the District Juge (*C. Liesching*) recorded as follows:—"I yesterday had occasion to inquire into case No. 73, in which the cause of action was identical with the present, viz., a seizure, in satisfaction of a writ taken out by the present defendant, of certain movables the joint property of plaintiff and his brother. The movables, the subject of this action, are the sole property of the plaintiff, but that does not entitle him to bring two actions. It was quite competent for the two brothers to have brought two actions; that is to say, each brother for the property due to him individually. But it is not competent for the present plaintiff to bring two actions for no better reason than that he was entitled to a half of one set of movables and the whole of another set. As an alternative the two brothers might have joined in one action." He further considered that section 34 of the Civil Procedure Code left him no discretion in the matter.

He then proceeded to examine the plaintiff, and elicited the circumstances of action No. 73. Thereupon the defendant moved for dismissal of the plaintiff's action, and the District Judge dismissed it accordingly. The plaintiff appealed.

Fernando for plaintiff appellant.

J. Grenier for defendant respondent.

Cur. adv. vult.

On June 23, 1891, the following judgments were delivered.

Clarence, J.—I think that the District Judge has misapplied section 34 of the Code.

Plaintiff asks for a declaration that he is the owner of certain moveable property which defendant has seized as assets of a third party against whom defendant has a judgment.

It would appear that in another action pending in the same District Court the plaintiff and his brother sued for a similar declaration as against the same defendant in respect of certain other movable property which they claimed as their joint property. I infer from the District Judge's note that the seizure was one and the same, all property being seized together. If, however, it is the fact that part of the property was owned by plaintiff solely and part by plaintiff and his brother, there has been no splitting of action within the meaning of section 34. Plaintiff was entitled to maintain a separate action for his own property, and could not have compelled his brother to join. The order from which plaintiff appeals must therefore be set aside. It seems that upon the District Judge's suggesting the point the defendant's proctor moved that plaintiff's action be dismissed. Therefore, since the dismissal was at defendant's instance, plaintiff must have his costs.

Judgment set aside and case sent back to District Court for further proceedings in due course, defendant to pay plaintiff's costs of the day in the District Court and costs of the appeal.

Dias, J.—The defendant issued a writ of execution and, through the Fiscal, seized some movable property, and the plaintiff brings this action to establish his right to that property. The defendant justifies the seizure, and the only issue on the pleadings is whether the plaintiff or the defendant's execution debtor is the owner of the goods. On the trial day some objection was taken by the defendant's proctor under section 34 of the Civil Procedure Code, and this objection was upheld by the District Judge, and the action was dismissed. The record does not give us much information as to what took place at the hearing; but so far as I can gather from the Judge's notes of the 20th of February, the objection was that the plaintiff having brought another action to establish his right to some part of the property seized under the same writ and on the same occasion, he had no right to maintain this action. From the plaintiff's examination it appears that the

Fiscal seized a quantity of furniture, part of which was the joint property of the plaintiff and his brother, and part of it was the sole property of the plaintiff. With regard to the joint property, the plaintiff and his brother instituted the case No. 73, and the plaintiff instituted this action for his separate property. The District Judge held under section 34 of the Code that the plaintiff cannot split his cause of action. If the District Judge's reading section 34 is right, the plaintiff ought to have included his present claim in the case No. 73 which he instituted with his brother. Such a libel would clearly be demurrable for a misjoinder of parties and causes of action. Otherwise the District Judge will have to give two judgments, one to plaintiff individually. and one for him and his co-plaintiff jointly. The District Judge failed to see the distiction between the seizure and cause of action. He treated them both as one. One seizure may give rise to several causes of action, as in this case. With respect to one, the plaintiff was bound to sue alone, and with respect to the other, jointly with his brother. He cannot blend his two causes of action in one case, as the rules of pleading would not allow it. Besides, the objection came too late: it ought to have been taken in the answer. I must set aside the judgment and send the case back for trial on the issues raised on the pleadings. The defendant must pay plaintiff the costs of the day and of this appeal. All other costs to be costs in the cause.

———:o:———

Present:—Burnside, C. J., and Clarence and Dias, JJ.

(*May* 26 *and June* 5, 1891.)

In the matter of the Stamp Ordinance No. 3 of 1890, and the application of D. L. Wickramanaike of Galle, Notary Public, under section 37 thereof.

Appeal—transmission of petition by post—calculation of time—holidays—Ordinance No. 3 *of* 1890, *sections* 37 *and* 38—*holidays Ordinance,* 1886.

Section 37 of the Stamp Ordinance, 1890, provides for application, by any person desirous of removing doubts as to the liability of any instrument to stamp duty or as to the amount of stamp duty, to the Commissioner of Stamps to declare his opinion thereon.

Section 38 provides that the person making the application may appeal against the determination of the Commissioner to the Supreme Court within ten days after the same shall have been made known to him.

The Commissioner of Stamps, having, upon application to him, made a certain decision, the applicant within the proper time transmitted by post a petition of appeal to the Supreme Court, but certain public holidays having intervened the petition did not reach the Registry of the Supreme Court until after the requisite ten days had expired.

Held that, under the above section 38, the appeal must actually be lodged within ten days in the Registry of the Supreme Court, and that the intervention of the public holidays did not avail to extend the time and that therefore the appeal was out of time and could not be entertained.

The appellant, a notary, who had attested a certain instrument, applied in writing to the Commissioner of Stamps under section 37 of the Ordinance No. 39 of 1890 for a declaration as to the stamp duty required. The Commissioner having made his declaration, which was communicated to the applicant on March 17, the applicant forwarded by post an appeal to the Supreme Court under section 38 within 10 days of the declaration, but owing to the public holidays at Easter and the consequent postal arrangements the petition of appeal did not reach the Registrar till after the 10 days had expired, viz., on April 2. Objection was taken at the hearing on the ground of the delay.

Withers for appellant.

Hay, A. S. G., for the Crown.

Cur. adv. vult.

On June 5, 1891, the following judgments were delivered :—

Burnside, C. J.—This petition is out of time, and I am afraid we have no power to receive it. The Ordinance expressly provides that the appeal shall be made within ten days.

The appellant gives as a reason for the delay that the Post Office was closed on some intervening days, they being public holidays. The appellant is responsible for this: he entrusted the petition to the Post Office, and he should have noticed that public holidays intervened. The petitioner's counsel relied on the Public Holidays Act, which made those days *dies non.* The argument would have been forcible had the petitioner been called upon to do any particular act on any one of those days, but it cannot avail to extend the time in which the petitioner had the right of appeal.

Clarence, J.—I agree that we have no power to entertain this appeal. We cannot consider an appeal as having been on foot until it is actually lodged in our Registry. It is no doubt true that this appellant posted his appeal petition within the ten days, and that in ordinary course it would have been delivered at the Registry in time, whereas (in consequence, as it is said, of holidays) it did not reach the Registry till after the

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ten days. This is appellant's misfortune: he might have sent up his appeal by the hands of some agent; but since he chose the Post Office, which failed to lodge his appeal for him in time, we have no power to accept it. I do not think that the Public Holidays Act helps the appellant.

DIAS, J., concurred.

—:o:—

Present:—CLARENCE and DIAS, JJ.

(*November* 27 *and December* 8, 1891.)

D. C., Galle, No. 253. } GUNEWARDANE v JAYASUNDERA.

Procedure—Action to realize a mortgage—Practice of making a co-mortgagee defendant on his refusal to join in the action as plaintiff—Civil Procedure Code, section 17*—Pleading.*

In an action to realize a mortgage in favour of two persons, where one mortgagee refuses to join the other as plaintiff in bringing the action.

Held, that, independently of the provisions of sec. 17 of the Civil Procedure Code, one mortgagee may sue alone, making the other a party defendant.

Semble, in such a case the plaintiff is not bound to restrict himself to the recovery of only half the debt, but might sue for the whole debt, leaving it to the mortgagor to protect himself in that respect.

Observations as to the necessity of meeting by way of replication new matter pleaded in the answer.

The facts of the case sufficiently appear in the judgment of the Supreme Court.

Wendt for plaintiff appellant.

Dornhorst for 1st defendant respondent.

Cur. adv. vult.

On December 8, 1891, the following judgments were delivered:—

CLARENCE, J.—This is a singular case; but I don't think that it presents any difficulty, except such as arises from the circumstance that a hearing seems to have taken place on no issue. Plaintiff's case is that the first two defendants made a mortgage in favor of plaintiff, and 3rd defendant securing a debt of Rs. 500. Plaintiff now sues the mortgagors and makes the other mortgagee a 3rd defendant in the case, averring that he has refused to join in the suit as a party plaintiff.

The District Judge has dismissed the plaintiff's suit on the short ground that the plaintiff seeks to recover from the first two defendants half only of the mortgage debt and, incidentally to the relief asked for, prays for mortgagee's decree to sell half only of the mortgaged property. I do not think that the plaintiff ought to be put out of Court on that ground. As at present advised, I think that the plaintiff might have sued for the whole debt, leaving it to the mortgagors to protect themselves in case of plaintiff establishing the existence of a debt. Since in the view I take, the case may go back to the District Court for a finding on facts on the terms of plaintiff paying the costs of this appeal, the plaintiff may, if he pleases, amend the plaint. We must go deeper into the case.

The 1st defendant only has answered to the plaint. He contends that as matter of law the plaintiff cannot maintain the suit as thus constituted, and further upon the merits pleads in substance that the consideration for the obligation declared on was that it was entered into by the 2nd defendant, and himself as a collateral security to the obligees for the sub-rent of certain arrack rents taken by the obligors under the obligees who were the renters under the Government.

First, as to the plaintiff's right to sue alone for the mortgage debt, making his co-mortgagee a party defendant. The 17th section of the Procedure Code declares that "if the consent of any one who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint." It is conceivable that there may be cases in which a mortgage ought not to be realized except by consent of all the mortgagees; and I do not say that in such a case, if such a case there be, section 17 would entitle one mortgagee to force on a suit to realize counter to the judgment of his fellows. We need not consider such a case until it arises. The circumstances under which the plaintiff sues alone, are disclosed in the evidence. It appears that the 3rd defendant refuses to join in suing, holding that there is no debt to recover. Under those circumstances I think that the plaintiff ought not to be debarred from suing. What levy may have to be made in the event of plaintiff succeeding in establishing the existence of the debt may be an ulterior question which we need not consider now. *Luke* v. *South Kensington Hotel Co., L. R.* 11 Ch. D. 121 is an authority in support of the proposition that, independently of any such statutory provision as that of sec. 17 of our Code, a plaintiff, situated as the present plaintiff is, may sue, making his co-mortgagee a party defendant.

Taking it then that the suit is maintainable in principle, we proceed to the merits. When we turn to the facts, it appears that the consideration for the mortgage is as 1st defendant says. The 1st defendant set up this plea in his answer, and the plaintiff did not in any subsequent pleading traverse the facts so averred or join issue upon the averments. Defendant in his answer further averred a payment to the mortgagees, before action brought, of the debt secured by the mortgage, which averment also the plaintiff made no attempt to meet. Evidence, how-

ever, was adduced at the hearing as between plaintiff and 1st defendant, witnesses being called on either side. For the defence there was distinct evidence that the mortgage was given only as a security for the sub-rent, and this the plaintiff did not attempt to deny. There was also evidence as to satisfaction of the debt secured by the mortgage. In view of the admission of any evidence at all, it may be that the parties were under some misapprehension as to the effect of defendant's answer. Under those circumstances, I am willing, if plaintiff desires, to send the case back to the District Court for a finding by the District Judge upon the question whether the debt secured by the mortgage has in fact been satisfied, but plaintiff must pay the costs of this appeal. Plaintiff, if he pleases, may amend the prayer of his plaint.

DIAS, J.—This is an action by one of two mortgagees against the mortgagors to recover half the debt due on the bond, and for a mortgage decree confined to one-half of the property mortgaged. The plaintiff avers that his co-mortgagee refuses to join him as plaintiff, and he therefore makes his co-mortgagee a defendant (3rd) to the suit. The 1st is the only defendant who appeared to the action, and he takes exception as a matter of law to the frame of the action and the relief prayed for. On the merits he says the bond was given to plaintiff by way of security for the payment by him and the 2nd defendant of Rs. 100, being the purchase money due by them on account of a right to retail arrack in certain taverns purchased by them from the plaintiff. The 1st defendant further avers that he paid and satisfied the said purchase money, and that the plaintiff is not entitled to recover on this bond.

At the trial the 1st defendant called the 3rd defendant, who proved that the purchase money of the taverns had been duly paid to the plaintiff, and the 3rd defendant thus accounts for the 3rd defendant's refusal to join in the action. The plaintiff, when called as a witness, gave an evasive answer on the matter of the payment; but his evidence was contradicted by the 1st and 3rd defendants, and that evidence is supported by several other witnesses. The District Judge, however, did not deal with the case on the merits, but dismissed the action, apparently on the legal objection taken by the 1st defendant. I see no objection to the plaintiff joining the 3rd defendant as a party defendant. We have all the parties before us, *i. e.*, the mortgagors and the mortgagees, and the matters in dispute may be disposed of in this case; but the District Judge gives us no finding on the facts, and I agree with my learned brother that, if the plaintiff desires it, the case should go back for further hearing. The plaintiff must pay the costs of this appeal.

Present:—BURNSIDE, C. J., and CLARENCE and DIAS, JJ.

(*January* 22 *and* 24, *and April* 10, 1891.)

P. C., Kandy, No. 10,709. } RANKIRI v. KIRI HATTENA.

Maintenance—Charge of non-maintenance of illegitimate child—Question of paternity—Dismissal of previous charge—Res judicata—Ordinance No. 19 *of* 1889.

In proceedings under the Maintenance Ordinance No. 19 of 1889 against a putative father for non-maintenance of a child;—

Held, that the dismissal of a previous charge, whether for insufficiency of evidence or upon any other defect in the case, is a decision upon the merits, and such decision bars a second application.

Held (*dissentiente* CLARENCE, J.), that the liability created by the said Ordinance and the proceedings thereunder are in their nature criminal.

The defendant was charged under the Ordinance No. 19 of 1889 by the complainant with non-maintenance of a child, of which the defendant was alleged to be the father. The defendant pleaded in bar the decision in a previous proceeding, in which the defendant had been proceeded against and the complaint in respect of the same child had been dismissed, the Court not being satisfied with the evidence as to paternity. The Court overruled the defendant's plea, and heard evidence and made order adversely to the defendant, who thereupon appealed.

There was no appearance in appeal.

On April 10, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—There is in my opinion nothing in this case to distinguish it from that already decided by the Full Court reported in 5 *S. C. C.* p. 231, which is sufficiently authoritative on the point. I see no difference in the nature of the proceedings under this Ordinance and the old one, except indeed that the present proceedings are more essentially criminal than the former were.

I do not agree that the present Ordinance only enforces a civil liability.

There is no civil liability on a father to support his illegitimate family. There is no civil liability on him to contribute a sum certain, even for the support of his legitimate family, beyond the liability created by the express terms of this Ordinance, a liability in the nature of a fine, recoverable under proceedings especially criminal, in which a conviction or acquittal must be recorded. Against a conviction an appeal lies by the defendant. Against an acquittal an appeal lies at the instance of the Attorney-General, and rigorous imprisonment may be awarded as the punishment.

It is not possible, I think, to say that the proceedings under the present Ordinance are less criminal proceedings than those under the Ordinance for which it has been substituted. In my opinion they are more so, and the authority already decided applies. The order of the Police Magistrate must be set aside, and the defendant's plea upheld.

CLARENCE, J.—This is a proceeding under the Maintenance Ordinance No. 19 of 1889, and the first question for decision is, whether defendant's plea of *res judicata* should have been upheld. Complainant has two children, and the present proceedings concern the younger child. In November, 1890, after the Ordinance of 1889 had come into operation, complainant preferred a similar charge against defendant in respect of both children. Owing probably to the woman's ignorance, or that of the petition-drawer, the plaint was not entitled under the Ordinance of 1889, but the matter was one which could be dealt with only under that Ordinance. The defendant then admitted being the father of the elder child; and on his undertaking to take that child and maintain it, the Magistrate noted the admission and made no order concerning that child. The complainant apparently was not desirous to retain the child in her own keeping. With regard to the younger child, the complainant herself deposed that defendant was the father of that child, and called only one witness, the village arachchi, whose evidence contained no corroboration. The Magistrate then made the following note: "There is no further evidence. The evidence is insufficient to fix on accused the parentage of the second child. I dismiss the case; accused undertakes to remove and maintain the elder child." This disposal of the complainant's first complaint took place on November 19, 1890. On November 25, 1890, complainant instituted a second proceeding with reference to the younger child. Defendant appeared to summons, and took in substance the objection that the order made on the first complaint is *res judicata*, barring any further complaint concerning the younger child. The Magistrate overruled that objection, and the question which we have to determine is, whether that ruling is correct.

A similar question came before the Full Court in the case reported 5 *S. C. C.* 231 under the now repealed enactment in the Vagrants Ordinance 1841. The question now before us arises under the Ordinance No. 19 of 1889. By the new Ordinance one important change is made. Under the Ordinance of 1841, based on the English Act of 5 George IV., these proceedings were distinctly criminal prosecutions. Under the new Ordinance the proceeding is a civil one. The adjudication upon the complainant is not a conviction or acquittal of an offence, but a decision upon a matter of civil liability. It is true that in certain of the proceedings, including the mode of enforcing a judgment in the complainant's favour, the procedure under the Criminal Procedure Code is adopted; but the trial or hearing is essentially an adjudication as to a civil, and not a criminal, liability. In this respect, therefore, the proceedings under the new Ordinance resembles English bastardy proceedings under 7 & 8 Vic. chap. 101, and 8 & 9 Vic. chap. 10. There are several late decisions settling the law on questions of *res judicata* raised under these statutes, the latest being *Regina* v. *Glynne, L. R.* 7 *Q. B. D.* 16; and we may derive from those decisions a rule applicable to proceedings under the Ordinance 19 of 1889. The Act of 7 & 8 Victoria gave to the mother a remedy somewhat similar to that which previously had been allowed to the parish. Affiliation orders might be made by justices in petty sessions and appeal lay, but for the putative father only to quarter sessions. The appeal amounted in fact to a rehearing; and an affiliation order either in petty sessions or at quarter sessions could only be made if the mother's evidence was corroborated in some material particular by other evidence to the satisfaction of the Justices. This requirement as to corroboration is copied into our Ordinance. There was no form of adjudication expressly provided in these statutes for those cases in which the adjudication is in favour of the defendant party, and there have been numerous decisions on the point of *res judicata* in cases where an order against the defendant was refused on the ground of want of sufficient corroborative evidence. *Reginna* v. *Glynne* now definitely settles the law to be, that where an order adverse to the applicant is made in petty sessions, the order is not absolutely conclusive, but is weighty evidence, and should be regarded on a seocnd application as practically conclusive unless there be reason to the contrary. In *Regina* v. *Gaunt, L. R.* 2 *Q. B.* 466, it was shewn that the former order had been obtained by perjured testimony of a witness since convicted of perjury in the same matter, and it was held that an affiliation order made on a second application was good. But where the affiliation order has been refused in quarter sessions, "whether upon the ground that the evidence did not satisfy the Justices, or whether they adjudicated that the case was defective in any other way" (I quote Lord Blackburn in *Regina* v. *Glynne*) *Regina* v. *Glynne* decides that that is to be reckoned a decision "upon the merits", and that such a decision of quarter sessions upon the merits bars a second application.

With regard to the renewal of application after a refusal in petty sessions, various reasons were assigned in some of the older cases *temp.* Lord Hardwicke, and in *Regina* v. *Machen,* 18 *L. J. M. C* 213, for considering

that the refusal was not to be deemed final in its nature. These reasons were based upon the views taken by the Judges of the special character of the jurisdiction of justices in petty sessions and the circumstance that right of appeal lay to the defendant party only. They were doubted in later cases, *e.g.*, by the late Sir Robert Lush in *Regina* v. *Gaunt*; but ultimately in *Regina* v. *Glynne* the Court assented not to disturb the ruling already quoted. Refusals in quarter sessions for want of convincing evidence were held to be absolutely conclusive.

I think that there is no difficulty in applying the principal of *Regina* v. *Glynne* to cases under our Ordinance. There is no analogy between the decision of a Magistrate under our Ordinance and the decision of Justices in petty sessions under the English Acts of 7 & 8, and 8 & 9 Victoria. Either party can appeal from the Magistrate's decision. I can see no reason for holding that the decision of a Magistrate in such case, not appealed from, is other than a final determination between the parties. On the contrary, it seems to me that in point of finality the Magistrate's orders, not appealed from, and the order of the Appellate Court stand on the same footing, and we should apply to either the same principle as the Court in *Regina* v. *Glynne* applied to refusals in quarter sessions.

In the case before us the Magistrate dismissed the mother's application on the ground that the evidence was insufficient. We ought to hold that decision a bar to her second application.

For these reasons I am of opinion that the Magistrate's order should be set aside, and complainant's application dismissed.

DIAS, J.—The question here is, whether the plea of *res judicata* pleaded by the defendant is good in law. The Police Magistrate I think rightly dealt with the case as a criminal case. Some of the provisions of the Ordinance of 1889 are of a civil nature, as fixing the amount to be paid by the reputed father, and how and when it is to be paid; but the bulk of the matter dealt with by the Ordinance is criminal or quasi-criminal. It appears that in a previous suit instituted by this complainant against the defendant for not maintaining this same child, the Police Magistrate ordered as follows: "I dismiss the case." What he meant was to enter a verdict of not guilty; and this is the matter which is put forward by the defendant as *res judicata.*

In my opinion the plea is good, and the complainant's application should be refused.

Present:—BURNSIDE, C. J., and CLARENCE and DIAS, JJ.

(*September* 10, *November* 24, *and December* 8, 1891.)

C. R., Gampola, No. 329. } MUDALIHAMY v. KARUPANAN.

Buddhist Temporalities—Ordinance No. 3 of 1889—Temple property—Tenancy created by priestly incumbent—Action for rent by lay trustee—Cause of action—Pleading.

The Buddhist Temporalities Ordinance, No. 3 of 1889, sec. 17, provides for the election and appointment for every temple a trustee, in whom, by sec. 20, all property belonging to the temple are vested.

Sec. 19 provides: "All contracts made before the date of the coming into operation of this Ordinance in favour of any temple or of any person on its behalf, and all rights of action arising out of such contracts, may be enforced by the trustee under this Ordinance as far as circumstances will admit as though such contract had been entered into with him; and all persons who at the said date owe any money to any temple or to any person on its behalf shall pay the same to such trustee, who is hereby empowered to recover the same by action if necessary."

Where a person was in occupation of a tenement belonging to a temple under a tenancy created by the priestly incumbent of the temple subsequently to the coming into operation of the Ordinance;

Held (*dissentiente* BURNSIDE, C. J.), that the lay trustee of the temple could properly sue the occupant for rent, although the contract of tenancy was not entered into directly with him.

The Buddhist Temporalities Ordinance No. 3 of 1889 came into operation on November 15, 1889, by proclamation of that date. The plaintiff in this case, who is trustee appointed under the Ordinance for Niyangampaya Vihare, instituted this action on June 2, 1891, against defendant for rent of a certain tenement belonging to the Vihara for the period from May, 1890, to May, 1891. The plaint, after stating the plaintiff was "lay incumbent and trustee" of the Vihara, alleged "that defendant is the occupant" of a certain house belonging to the Vihara "at the monthly rental of Rs. 4", and "that the defendant is indebted to the plaintiff as such trustee in respect of house rent in the sum of Rs. 48 at Rs. 4 per mensem".

The answer, among other things, pleaded that the plaint disclosed no cause of action against the defendant; and it further averred that the defendant took the house on rent from one Guneratne Unanse a year previously, and that in January, 1891, he rented the house from Guneratne Unanse for one year, and paid a year's rent in advance to the Unanse.

The evidence showed that the plaintiff was appointed trustee in May, 1890, and that the defendant had entered into occupation under Guneratne Unanse, the incumbent of the Vihara, and not under plaintiff.

The Commissioner gave judgment for the plaintiff, and the defendant appealed.

The appeal first came before BURNSIDE, C. J., on September 10, and it was by his order set down for argument before the Full Court. The appeal accordingly came on for argument before the Full Court on November 24.

Wendt for defendant appellant.

Dornhorst (*Seneviratne* with him) for plaintiff respondent.

Cur. adv. vult.

On December 9, 1891, the following judgments were delivered :—

BURNSIDE, C. J.—This is an appeal by the defendant against a judgment for the plaintiff on the facts, there being a demurrer to the libel undisposed of.

The libel alleges that under the Buddhist Temporalities Ordinance the plaintiff is the lay incumbent and trustee of all property belonging to the Niyangampaya Vihara, and that the defendant is the occupant of a house belonging to that Vihare at a monthly rental of Rs. 4, and he claims that rent for a year from May, 1890, to May, 1891.

The defendant demurs to that libel, and in my opinion his demurrer must be upheld.

I do not find that the Ordinance in question creates such an office as "lay incumbent"; but even assuming that the plaintiff was duly appointed "trustee" under the Ordinance, he could only recover rent from a person in possession of the property of the Vihara upon a contract to pay rent made with himself as trustee or by virtue of a contract to pay rent entered into in favour of the temple before the coming into operation of the Ordinance, the right of action on which became vested in him under the 19th section of the Ordinance. Neither of these contracts is alleged in the libel, and it therefore discloses no cause of action ; and the evidence at the trial does not supplement the libel, if, indeed, under this peculiar Ordinance it would be permissible to give judgment on the facts, irrespective of the pleadings, as we sometimes do.

The judgment of the Court below set aside, and judgment for defendant with costs in both Courts.

CLARENCE, J.—I am of opinion that this judgment should be affirmed.

The plaint filed by a plaintiff suing without any professional assistance is a plaint by a temple trustee, appointed under the Buddhist Temporalities Ordinance, to recover rent for a house belonging to the temple. It avers that plaintiff is "lay incumbent and trustee of all properties belonging to Niyangampaya Vihara", and claims Rs. 48, as twelve months' rent at Rs. 4 per month, for a house which is averred to be the property of the Vihara. The plaint is open to objection, inasmuch as it does not aver that defendant is tenant under any demise made by any person on behalf of the temple. It merely avers that defendant is the occupant of house so and so, belonging to Niyangampaya Vihara, at a monthly rental of Rs. 4, which is not enough. The defendant in his answer purported to raise in general terms the objection that the plaint is insufficient, but no demurrer was pressed at the hearing. On the contrary, the defendant, both by his answer and evidence, set up a contention that defendant is tenant under a demise made by one Guneratne Unanse who is the priestly incumbent of the Vihara. Defendant therefore has himself supplied the defect in the plaint. The plaint avers the plaintiff to be the "trustee" of the Vihara, and that averment having been traversed in defendant's answer is proved by plaintiff's evidence. We must therefore proceed to consider such other points as have been mooted.

The plaint avers that the house in question is the property of the Vihara, and that averment is not traversed by defendant's answer. Even, however, if it be open to defendant to contend upon this plaint, and answer that this house is *pudgalika* and and not *sanghika* property, the defendant has singularly failed in such contention. Unquestionably the house in question is *sanghika* property of the Vihara. As such it is vested, under sec. 20 of the Ordinance, in the plaintiff, the trustee ; and by sec. 19 all contracts made in favour of any temple or of any person on its behalf, even though made after the Ordinance came into operation, are enforceable by the trustee, who may recover all moneys due to the temple. The house in question appears to have been demised by the priestly incumbent of the Vihara, Guneratne Unanse, at a monthly rental of Rs. 4, to defendant. The answer indeed sets up a demise for a year, but the the evidence proves only such a monthly demise as can be made by parole. Defendant contends that the Unanse in January, 1891, demised the house to him for a year and received a year's rent in advance, and the Unanse endeavours to support the defence. This defence completely fails. The Commissioner entirely disbelieves the story of the payment of rent in advance. If we could suppose that the payment which defendant sets up was actually made by defendant to the Unanse, further considerations would arise ; but the finding of the Magistrate renders it unnecessary to go further. It is evident that the defence set up is a dishonest and impudent attempt by the defendant and the Unanse in collusion to defeat the lawful claim of the trustee.

DIAS, J.—The plaintiff, as a trustee appointed under the Buddhist Temporalities Ordinance No. 3 of 1889, sues the defendant for Rs. 48, being 12 months' rent for a house, the property of the Vihara, of which the plaintiff is the trustee. The right of the Vihara to the house and the defendant's occupation of the house are not denied; but the defendant sets up a tenancy under a priest who was the incumbent of the Vihara, and says that he paid the rent in advance to the priest, and calls the priest to support the story. It is quite clear from his evidence that he has no love for the Buddhist Temporalities Ordinance or the plaintiff, the trustee. The priest sets up a right to the house as his private property, which he can dispose of as he pleases. When the priest made this statement he must have well known that the claim which he set up was utterly unfounded. It will be news indeed to a Buddhist priest of any respectability to learn that the endowments of a Vihara are not *sanghika* property, not even the images in the Vihara; and I need hardly add that the claim set up by the priest was the most impudent that was ever set up by any priest. The defendant seems to have got into possession under his friend the priest; but under section 19 of the Ordinance the defendant is bound to pay the rent to the plaintiff trustee. I think the Commissioner has taken a correct view of the law and facts, and his judgment should be affirmed.

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Present:—BURNSIDE, C. J.

(*June* 11 *and* 17, 1891.)

P. C., Galle, No. 1,330. } JANSZ v. USUBU LEBBE.

Medical practitioner—Sale of "legium"—Opium—Ordinance No. 4 of 1878, sections 10 & 13—Interpretation.

Ordinance No. 4 of 1878, section 10, makes it penal to possess or sell without a license any opium or bhang, which by section 4 includes respectively any preparation in which opium or bhang forms a component part.

Section 13 provides that nothing in the Ordinance shall be held to prevent any medical practitioner or druggist from selling by retail or possessing opium or bhang *bona fide* for medicinal purposes.

In a charge under section 10 against a Moorman, practising in native medicine, for sale of *legium*;—

Held, that defendant was a "medical practitioner" within the meaning of section 13 of the Ordinance, and was therefore entitled to the exemption created by that section.

In answer to the charge, the defendant relied upon the exemption created by section 13 of the Ordinance; but the Police Magistrate convicted him, holding that the section applied only to qualified medical practitioners. The defendant appealed from the conviction.

Ramanathan for defendant appellant.

Cur. adv. vult.

On June 17, 1891, the conviction was set aside by the following judgment:—

BURNSIDE, C. J.—The charge against the appellant in this case is, that he sold *legium*, being a preparation of opium, in his shop, in breach of the 10th section of the Ordinance No. 4 of 1878. Now, the 13th section of the Ordinance exempts medical practitioners from the operation of its provisions. The defence set up, *inter alia*, was that the appellant was a Moorish medical practitioner. The Ordinance nowhere defines to whom the description "medical practitioner" shall extend, and we must give the words their ordinary meaning. Medical practitioner means nothing more nor less than one who practises medicine, without reference to his qualification or the manner or result with which he practises it. Now, the defendant has called a witness, a vedarala, who says that the prisoner practises medicine, and that this preparation is used as a medicine. This is, I think, quite sufficient to bring him within the protection of the 13th clause, and he must be acquitted.

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Present:—BURNSIDE, C.J., and CLARENCE and DIAS, JJ.

(*August* 18, *and September* 1, 1891.)

P. C., Jaffna, No. 8,529. { CANTHAPILLAI ODYIAR v. MURUGESU.

Resistance to a public officer—obstruction—Ceylon Penal Code, section 183—Execution of writ against property—Claim and obstruction of seizure—Right of private defence—Ceylon Penal Code, sections 89, 90 & 92.

Section 89 of the Ceylon Penal Code enacts: "Nothing is an offence which is done in the exercise of the right of private defence."

Section 92 sub-section 2 provides: "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done, by the direction of a public servant in good faith under colour of his office, though that direction may not be strictly justifiable by law."

The complainant, a Fiscal officer, in executing a writ against property, attempted to seize as the property of the execution-debtor certain cloths lying in the defendant's shop and claimed by defendant as his. The defendant resisted the seizure, taking the goods out of the hand of the officer and replacing them in an almirah from which the officer had taken them.

In a charge against the defendant, under section 183 of the Ceylon Penal Code, of obstructing a public servant in the discharge of his public functions;—

Held, that the property sought to be seized not being proved to be other than defendant's, the obstruction, not amounting to an assault or personal injury, was a lawful act in the exercise of the right of private defence of property, notwithstanding the provision of section 92 sub-section 2 of the Penal Code, and did not constitute the offence contemplated by section 183 of the Code.

The facts of the case sufficiently appear in the judgment of Clarence, J.

The Police Magistrate (Arthur Alvis) convicted the defendant, holding that, even assuming that the goods sought to be seized belonged to defendant, the obstruction could not, in view of section 92 sub-section 2 of the Penal Code, be justified, as the complainant had acted in good faith under colour of his office. The defendant appealed from this conviction.

There was no appearance of counsel in appeal.

On September 1, 1891, the following judgments were delivered:—

BURNSIDE, C. J.—I do not agree that section 92 of the Code touches the question before us. Had the complainant been suing for an injury to his person from any act of the accused, it perhaps would not lie in the accused's mouth to say: "I assaulted you in the exercise of the right of defence of my property which you had seized or were attempting to seize." But here the complaint is that the accused "did offer resistance to and obstruct" the complainant in the exercise of his *lawful* authority in breach of section 181 of the Code.

I cannot construe that clause to make it an offence to offer resistance to the taking of any property by the authority of any public servant known to be a public servant. That would be most dangerous law, I think. In my opinion it is as much now, as ever it was, incumbent on a person who prosecutes for resistance or obstruction under section 181 of the Code to shew by way of complaint that he was acting by *lawful* authority. The accused cannot be made responsible under the section for merely resisting him. There is a material distinction between resistance and the aggression to which only section 94 of the Code applies. There is no sufficient proof in this case that the property was the property of the judgment-debtor, and I think the accused in possession of the property had the right to resist the taking of it. He did no more than resist, and he should be acquitted.

CLARENCE, J.—I have felt some difficulty in this case; but upon consideration I agree with the Chief Justice.

Appellant is charged under section 183 with obstructing a public servant, viz., an officer in the employ of the Fiscal, in the discharge of his public functions. The proof is, that the officer, having in his hands a writ for a levy on the goods of one Kartikasoe, proceeded to seize some cloths which he supposed to be Kartikasoe's. The cloths were in a shop in which Kartikasoe had formerly traded; but appellant resisted the attempt to seize, claiming the cloths as his, and asserting that he, and not Kartikasoe, now owned the shop. The resistance offered by appellant consisted in his taking the cloths out of the hands of the officer and replacing them in an almirah from which the officer had taken them. The Magistrate has not found that the cloths were Kartikasoe's, and the evidence, to say the least, leaves that point doubtful. Had the officer then persisted in his attempt to seize, and had appellant in maintaining his resistance done anything amounting to an assault upon the officer, it may be that by the operation of section 92 the appellant would have been open to conviction if charged with the assault. We ought not to impose restrictions on the common law right of private defence of a man's property, except where the Legislature has plainly created such restrictions; and upon a consideration of those sections of the Code which deal with private defence, I am not satisfied that so much as this appellant is shown to have done in defence of property, not proved to be other than his, has been constituted an offence. I agree that appellant be acquitted.

DIAS, J., concurred.

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Present:—CLARENCE and DIAS, JJ.

(*November* 17, *and December* 4, 1891.)

D.C., Colombo, No. 1,328. } MOURIER v. THE MUNICIPAL COUNCIL, COLOMBO

Assessment—Rating—Annual value—Block of house property—Method of assessment—Ordinance No. 7 of 1887, sections 127 & 133.

The Ordinance No. 7 of 1887 empowers the Municipal Council "to make and assess, with the sanction of the Governor in Executive Council, any separate or consolidated rate or rates on the annual value of all houses and buildings of every description, and all lands and tenements whatsoever, within the Municipality".

Section 133 provides for the appointment of valuers to make "an assessment of the annual value of every house, building, land, or tenement whatever liable to be so assessed within the Municipality."

In the case of a block of house property belonging to one owner let as a whole to one person, who sub-lets to actual occupiers;—

Held, that the question whether, in ascertaining the annual value for rating purposes, the block should be assessed as a whole or each building separately, must be decided according to the circumstances of each case.

Accordingly, where the property to be assessed consisted of a long range of 19 small houses fronting a public thoroughfare, having one compound appurtenant to the whole row, with one well and two closets

for the accommodation of all, and where the whole was let as one property to a tenant who sub-let separately to actual occupiers.

Held, that the buildings should be regarded as separate tenements for purposes of rating, and that the annual value for rating is, for each tenement, the rent for which it can reasonab'y be expected to be let in an average year by the middleman to the occupier, and the annual value of the whole block is the aggregate of such rents.

But *held*, that, in making the computation for the whole block, regard may be had to the circumstance that in the case of small holdings there are periods of non-tenancy occasionally, and that the rents are not always to be obtained.

The Municipal Council assessed the row of buildings in question for the year 1891 at Rs. 1,104, taking the aggregate of the annual values which they put upon the separate lots. The plaintiff instituted these proceedings for the purpose of reducing the assessment to Rs. 720, which was the amount he received from the tenant to whom the premises had been let as a whole. The District Judge held that the annual value for purposes of rating was that the proprietor received from the immediate lessee, and not what the latter obtained by sub-letting in separate lots to occupiers, and gave judgment for the plaintiff. The Municipal Council thereupon appealed.

Dornhorst (*Grenier* with him) for the appellant.

Sampayo for the respondent.

Cur. adv. vult.

On December 4, 1891, the following judgments were delivered: —

CLARENCE, J.—This is a rating appeal, in which the Colombo Municipality are appellants. The property in question consists of a number of houses or rooms not detached, standing in a row fronting the Grandpass Road, situate in one compound, or having one compound appurtenant to the whole row, and with one well and two closets for the accommodation of the whole.

The owner lets all this compound and buildings to one tenant, who pays him Rs. 720 a year, the owner repairing and paying the rates, and this tenant sub-lets the buildings to separate occupants. The Municipality, upon a computation based on the rents which they consider to be thus obtainable by this middleman, assesses the property as being separate tenements, at annual values aggregating Rs. 1,104 a year. Substantially, the question which the owner and the Municipality are contesting is, whether this property should be assessed, as the owner contends, in one lot, at the best rental reasonably obtainable for it in one lot, or, as the Municipality contend, in separate tenements.

Respondent says, and there is no reason to doubt it, that the Rs. 720 a year is the best value he can get for the property, letting it in this way. The District Court, upholding the respondent's contention, that the basis of assessment should be the rental obtained by letting the property *en bloc*, has reduced the assessment to Rs. 720, and the Municipality appeal. Even on this footing the rateable value would be a little more than the Rs. 720, because, according to the interpretation clause of the Ordinance, as we have construed it, the annual value for rating purposes means the annual rental reasonably obtainable *plus* the outgoings for repairs and taxes. The main question, however, which the application raises is, whether the appellants are within their right in insisting on rating the property as 19 separate tenements. It appears that the appellants have numbered the premises in their books for rating purposes as 19 separate tenements under numbers ranging from 208 to 226, but that does not include the matter. Section 133 merely directs, assessment shall be made of the annual value of "every house, building, land, or tenement whatever" which is liable to be assessed; and the question is, which is the reasonable way of assessing this property, as one tenement or several?

There is a class of small house property in large towns of which it is commonly said that the rents are hardly more than a payment for the trouble of collecting them; and such property is not infrequently let in large lots to a middleman, who sub-lets, and so makes the best profit he can. When the owner of a block of house property finds it convenient to lease the whole to a middleman who makes a profit by sub-letting to actual occupiers, it certainly does not follow as of course that the property is to be assessed in one lot for rating. Neither can there be any hard and fast rule that every separate building standing in one compound or curtilage ought to be assessed separately. Each case must be decided according to its own circumstances.

In the present case I think that the description of the property which we find in the evidence bears out the contention of the appellants that it should be assessed in these 19 separate lots. The property appears to consist of a long range of building fronting one of the ma n thoroughfares of Colombo, occupied by a number of small families and occupants, one holding being occupied as an opium store, others as the separate dwellings of families, and one including a garden with 100 cocoanut trees and some plantain bushes. There is evidence that the opium store pays a rental of Rs. 9 a month, or Rs. 108 a year, to the respondent's lessee, and that most of the other lots are let by him at rentals of about Rs. 5 and 6 per month. In one case 5 smaller houses or huts in one range are assessed together.

It is doubtless convenient to respondent to deal with this property by leasing it one block to a responsible middleman who pays an annual rent for the whole, and undertakes not only the trouble of collecting from the actual occupiers, but also the risk of non-recoveries; but I think that these are reasonably regarded by appellants as separate tenements for rating purposes, and that the annual value for rating is, for each tenement, the rent for which it can reasonably be expected to be let in an average year by the middleman to the occupier. I do not say that in making the computation regard may not be had to the circumstance that there are seasons of non-tenancy occasionally, and that the rents are not always to be actually obtained. It may be that the appellants have made some allowance of this kind; but having laid down the principle on which the assessment is to be made, we must leave it to the District Court to carry out the computation.

Having decided that the mode of assessment as 19 separate tenements is to be upheld, I think that we should send the matter back to the District Court, in order that that assessment may be revised upon that footing. As the appellants thus succeed in their contention as to the principle on which the property should be assessed, I think that they are entitled to the costs of this appeal, and that all other costs should be left as costs in the matter.

DIAS, J.—The question here is, what is the gross annual value of the premises in question, and how it is to be ascertained. The plaintiff is the owner of a garden in the town of Colombo. There are about 19 small rooms on it, built together in a line facing the road. The plaintiff leased the garden and the buildings together to one man at a rental of Rs. 720 a year. The tenant sub-let the buildings separately to small tenants for sums varying from Rs. 1 to 9. The Municipality assessed the buildings separately, and, taking the rent paid by the sub-tenants, assessed the value of the buildings at Rs. 1,104 a year. The plaintiff contends that the gross annual value is Rs. 720, being the amount which he can get for the premises rented as a whole. This, no doubt, is a convenient way of leasing a property such as this; but the principle on which the plaintiff's assessment is based is contrary to the provisions of the Ordinance, which authorizes the Municipality to value every "house, building, &c." for rating purposes, and this may be effectually defeated if the plaintiff's method of assessment is followed.

An absentee proprietor of house property in the town may find it answers his purpose to lease it to one substantial tenant for an amount much below the annual value of the property when leased separately, leaving the tenant to make what profit he can by sub-letting. These considerations do not concern the Municipality; but nevertheless due allowance must be made for the precarious nature of the income derived from buildings like these in assessing their value, and the District Judge will no doubt take that into consideration. Having thus started the principle upon which the assessment should be made, I agree with my learned brother that the case should go back for further hearing. The appellants will be entitled to the costs of this appeal, all other costs to be costs in the cause.

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Present:—CLARENCE & DIAS, JJ.

(November 27 *and December* 8, 1891.*)*

D. C., Kandy, No. 3065. } SOYSA V. PUSUMBA and others.

Cause of action—Mortgage bond—Judgment on bond—Assignment of judgment—Action by assignee against original debtors and parties in possession of mortgaged property—Procedure.

A mortgagee obtained a money judgment against the debtors in an action on the bond. The judgment having become dormant, the plaintiff, to whom it had been assigned, applied in the original suit, making the debtors parties to the proceeding, to revive judgment and reissue writ; but the application having been refused, plaintiff brought a fresh action against the debtors for the rcovery of the judgment debt, and against certain others, who were in possession of the mortgaged property upon a purchase subsequent to the mortgage, for the purpose of obtaining a mortgage decree.

Held, that the refusal of the application to revive judgment in the original suit is a bar to a fresh action against the debtors for the recovery of the judgment debt.

Held, further that, plaintiff not being able to recover any debt from the original debtors, neither can he obtain a mortgagee's decree against purchasers claiming under them.

The plaintiff appealed from the judgment of the District Court dismissing his action with costs. The facts of the case appear sufficiently in the judgment of Clarence, J.

Wendt for plaintiff appellant.

Dornhorst for defendants respondents.

Cur. adv. vult.

On December 8, 1891, the following judgments were delivered:—

CLARENCE, J.—In 1876 Horatala and Pusumba bound themselves to Soysa for a debt of Rs. 1,000 and interest, and as security mortgaged a large number of lands, including three concerned in this suit. In 1879 Soysa sued Horatala and Pusumba and had judgment for principal and interest, but the judgment was merely a judgment for a sum of money, and did not include any mortgagee's decree

declaring the lands bound for the mortgage. Under that judgment Soysa sold various and sundry of the lands, not including the three concerned in this suit. In 1882 Soysa died, and in 1883 his executrix purported to assign to the present plaintiff for the sum of Re. 1 a debt of Rs. 613·55 said to be due under Soysa's judgment. Plaintiff now sues Pusumba and the widow and children of Horatala (who is dead, leaving an estate valued at Rs. 250 only) and the 8th and 9th defendants, who are said to have acquired the three lands concerned in this suit from Horatala and Pusumba since the mortgage. Plaintiff avers that a debt of Rs. 1,167·84 is due for principal and interest, but has chosen to restrict his claim to Rs. 250. For this sum he prays judgment against the first seven defendants, and also asks for a mortgagee's decree to sell the three lands above-mentioned.

It further appears that in Soysa's original action no steps were taken against the debtors between June, 1880, and June, 1889, when present plaintiff applied to have the judgment revived and writs reissued, which application the then District Judge, after hearing both parties, refused.

The learned District Judge has dismissed the plaintiff's suit, and plaintiff appeals.

The pleadings on either side are confused and imperfect. Some of the defendants purport to plead a "gift" by Soysa to them of some of the lands concerned, a meaningless plea, and plaintiff's pleader in replication purports to "join issue with the defendants on the allegations contained in their demurrer". The 9th defendant traverses plaintiff's averment that he is in possession of a certain one of the lands comprised in the original mortgage, and plaintiff at the hearing made no attempt to prove the affirmative. The facts, however, which we have above detailed, are undisputed, and on them rests plaintiff's case.

It is clear that plaintiff has no right to maintain this suit against Pusumba and the representatives of Horatala. The proceedings in the old suit are an answer to that claim. And since plaintiff cannot recover any debt from the original debtors, I am of opinion that neither can he obtain any mortgagee's decree against purchasers claiming under them, which, apart from all other considerations, disposes of plaintiff's case as against 8th and 9th defendants. Had the defence of 8th and 9th defendants depended only upon a plea of prescription which they have pleaded, we should have had to consider whether there have been within ten years, before suit against them, any recoveries or payments on the mortgage preventing a statutory bar of the mortgage debt from arising in their favour; but as the case is, we need not go into that question. The plaintiff's appeal fails, and is dismissed with costs.

DIAS, J., concurred.

Present:—BURNSIDE, C. J., and CLARENCE, and DIAS, JJ.

(July 3 and August 14. 1891.)

D. C., Colombo, No. 2,298. } MOHIDEEN HADJIAR v. PITCHEY.

Executor—Action against, before probate—Sale of testator's property—Letters of administration testamento annexo —Irregularity—Sale by administrator—Title—Procedure.

One of several executors of a will proved the will, but did not take out probate. A simple contract creditor of the testator sued the executor, who proved the will and, upon judgment obtained, a certain immoveable property belonging to the estate was seized and sold to a purchaser, through whom the defendant claimed. Subsequently no steps beyond proof of the will having been taken by the executor or executors, letters of administration *cum testamento annexo* were granted in the testamentary suit to the Secretary of the District Court, who as administrator sold the same property, when plaintiff became the purchaser.

In a contest between plaintiff and defendant as to the title to the property;

Held (*dissentiente* CLARENCE, J.), that the judgment obtained against the executor who proved the will, though he had not taken out probate, was good, and bound the estate of the testator, and that therefore the defendant, who claimed through the purchaser under that judgment, had good title to the property as against the plaintiff.

Held, that, the executor having proved the will and thereby accepted the trust, the letters of administration *cum testamento annexo* subsequently granted to the Secretary of the District Court were irregular and void.

Held, by BURNSIDE, C. J., that even if the letters were good until revoked, they did not have the effect of divesting the executor of the title which had vested in him under the will, and the administrator therefore had no title to convey to the plaintiff.

It appeared that Pasqual Fernando and his wife, Ana Selembrem, made a joint last will, whereby one Susey Fernando and six other persons were appointed executors. Pasqual Fernando died in 1882, and in December, 1882, Susey Fernando produced and duly proved the will in Testamentary Case No. 4,391 of the District Court of Colombo. In February, 1883, Ana Selembrem, the widow, by deed renounced all benefit under the joint will. Subsequently Susey Fernando, who proved the will, was sued as executor by a creditor on a promissory note, granted by Pasqual Fernando during his lifetime, in action No. 89,143 of the District Court of Colombo, and judgment having been entered writ was issued, and a house belonging to the estate was sold by the Fiscal on August 31, 1883, to a purchaser, from whom the defendant derived his title to the house.

After Susey Fernando proved the will, neither he nor any of the other executors took out probate,

and no further steps whatever were taken in the testamentary suit until September, 1888, when Mr. J. W. Mack, the Secretary of the District Court, applied for, and obtained letters of administration *cum testamento annexo* to the estate of Pasqual Fernando, but no notice of this application was issued to Susey Fernando or any of his co-executors, nor were they parties to the proceeding. Having so obtained letters of administration, Mr. Mack proceeded to sell a moiety of the house in question by public auction, at which the plaintiff became purchaser, and thereafter the plaintiff obtained a conveyance, in which the widow, Ana Selembrem, joined as to her moiety of the property.

The plaintiff now sued the defendant in ejectment, basing his title on the conveyance from the administrator and the widow. The defendant in answer pleaded the title derived by him through the purchaser at the Fiscal's sale under writ in case No. 89,143 against Susey Fernando as executor, and he also denied that Mr. Mack was lawfully appointed administrator. The replication objected to the answer on the grounds, among others, (1) that no title in the defendant was disclosed, (2) that it was not alleged that Susey Fernando took out probate, and (3) that the judgment in case No. 89,143 was not binding on the estate, for if the property vested it vested in Susey Fernando and his co-executors, who were no parties to that action.

The District Judge gave judgment for the defendant, and the plaintiff appealed.

Withers (*Dornhorst* with him) for plaintiff appellant. An executor's title vests only on probate. Here the executor did nothing beyond proving the will, and therefore the action against him was irregular. The judgment obtained in that action was against him personally, and did not bind the estate, and the Fiscal purported to sell the right title and interest of the defendant in the action, which was nil. The defendant who claims under the purchaser at the Fiscal's sale has therefore no title. The letters of administration granted to Mr. Mack held good until set aside, and the plaintiff having purchased from Mr. Mack it is submitted that his title was good.

Layard, A. A-G. (*Perera* with him) for the defendant respondent. The grant of letters of administration was irregular, and the letters void. They were granted on *ex parte* application without notice to the executor, who was already a party on the record and was entitled to notice. The property of the estate did not pass to Mr. Mack, and the plaintiff who purchased from him had no title. Further it is submitted that the judgment obtained against the executor was good, and bound the estate. Title vests in an executor by force of the will, and not from the probate. See judgment of Ashhurst J. in *Smith v. Milles,* 1 T. R., 480; and *Woolly v. Clark,* 5 B. and Ald. 744. The case of *Hood v. Barrington,* relied upon by the other side in the court below as showing that it is probate that confers title on an executor, dealt only with personalty and did not apply to real property. The executor in this matter proved the will, and he could take out the probate at any time he pleased. It is not necessary that an executor should have taken out probate before an action is instituted against him. It is sufficient if he has proved the will or has done any act as executor: *Douglas v. Forrest,* 1 M. & P., 663. The executor in this instance was therefore properly sued by the creditor of the testator, and the judgment against him was binding on the estate. It was not a personal judgment; he was sued as executor, and though the decree was to "recover from defendant", it must be taken to mean defendant as executor. It is submitted that the defendant who claims under the purchaser at the sale in execution of that judgment has good title.

Dornhorst in reply. It is submitted that property vests in an executor only on probate. In Ceylon an executor is in the same position as to realty as an executor in England is as to personalty: D. C., Kandy, 3,833, Civ. Min. May 22, 1891. So the case of *Hood v. Lord Barrington,* L. R. 6., Eq. 218, applies. There Lord Romilly said (p. 224) "What the will does is, it gives the power to obtain the probate, but when once the probate is obtained, the probate confers the power and the title in the executors to dispose of the property as they think fit." [BURNSIDE, C. J.—That does not touch the general proposition that an executor's title is under the will.] Realty and personalty are here on the same footing as regards vesting, and so *Hood v. Lord Barrington* applies; but if real property does not vest in an executor, then defendant who claims through the executor has no title.

Cur. adv. vult.

BURNSIDE, C. J.—I did not think that any difference of opinion could exist in this case. In my opinion the judgment is right, and must be affirmed.

The executor of Pasqual Fernando, having proved the will, took the half interest in the house in question, being part of the deceased's estate, both as executor by virtue of the will, he being especially charged with the payment of debts and legacies, and by operation of the law of the Colony, by which the real as well as personal property of a deceased passes to his executor or administrator, and the estate so vested in him could not be divested except in a formal and regular way by conveyance or by process of law.

The District Judge had no power, *mero motu,* to grant administration *cum testamento annexo* to a will which the executor, who is alive, had already

proved, and the letters of administration in this case were absolutely void, none such being known to the law. But even assuming that the letters were good until revoked, the property, as I have said, had already vested in the executor, and the mere letters would not divest it; and, if it were not divested and the administrator had no title in his representative capacity, then a sale by him, although with the leave of the Court, could not operate against the executor, who had title, and persons claiming through him. The fact that the judgment obtained against the executor was a personal judgment cannot affect the question. The debt for which it was recovered was a debt of the testator due upon a promissory note, and the judgment properly bound the deceased's property. It was for the executor alone to complain if it bound his own estate as well. At any rate the administrator *cum testamento annexo* and thoseclaiming through him had no *locus standi* to contest it.

The judgment is affirmed with costs.

CLARENCE J.—I think that this judgment should be set aside and judgment entered for plaintiff for an undivided half of the premises claimed, with costs in both Courts.

In 1881 Pasqual Fernando and Ana Selembrem, his wife, made a joint will, whereby the house now in question, No. 56, Bankshall Street, Colombo, was devised to the wife for her life, with remainder to a son, Anthony, and with a gift over in the event of Anthony dying without issue. Seven persons were appointed executors of the will.

The testator died in 1882. The testatrix still lives. One of the seven persons named in the will as executors, Susey Fernando, brought in the will and proved it in December, 1882, but neither he nor any of the other persons named as executors took out any grant to themselves or were sworn to administer.

The widow renounced her benefit under the will, and consequently the house in question as part of the joint estate devolved half to her and half under the will to the son Anthony, with remainder to the person entitled in remainder under the will.

In September, 1888, letters of administration to the estate of Pasqual Fernando *testamento annexo* were granted to the Secretary of the Colombo District Court, Mr. Mack, and in January, 1889, the administrator, having obtained leave from the District Court to sell, purported to sell the house to the plaintiff and executed a conveyance to plaintiff in July, 1889.

Meanwhile, in 1883, a person claiming to be a creditor of Pasqual Fernando sued Susey Fernando, already mentioned, one of the persons named as executors in the will, got judgment for a sum of money, and seized this house.

The judgment was "that the plaintiff do recover from the defendant the sum of Rs. 500 with interest and costs". In execution of that judgment the Fiscal in August, 1883, purported to sell to one Croos Fernando all the right, title, and interest of the defendant in the case, described as executor of the will of Pasqual Fernando, in the house.

Croos Fernando obtained a conveyance from the Fiscal, and thereafter mortgaged to the mortgagee, who obtained judgment on his mortgage, in execution whereof the Fiscal purported to sell the house in 1888 to defendant, who obtained a Fiscal's conveyance, and is in possession.

Plaintiff now seeks in this action to eject the defendant, and appeals from a judgment dismissing his action with costs.

We cannot support the judgment. The learned District Judge thought that the appointment of an administrator *testamento annexo* was under the circumstances void. It may be that the District Court ought not to have granted those letters of administration without taking more steps than were taken in the matter of citation to the executors named in the will. As to what was done in that matter or not done, we do not know. All that we know is, that the letters of administration *testamento annexo* were granted to Mr. Mack, and that they have not been cancelled.

There is no doubt that under the Law of Ceylon an executor has the same power over what in England is termed real property, as an executor in England and here has over what in England is called personal property. Moreover, according to all the authorities, an executor's title is derived from the will itself.

As laid down by Abbott, Chief Justice, in *Woolley v. Clark*, 5 B. and Ald. 745, the title of an administrator vests in him only from the time of the grant, but the title of an executor vests from the executor's death. This, however, I take it, implies that the executor does in time accept office and qualify, in which case his authority will relate back. So it was held, that under the old practice an executor could commence an action before probate, but could not declare, though if he afterwards proved i would relate back. Here, one of the persons named as executor brought in the will, which the District Court accepted as the will of Pasqual Fernando, but never took oaths of office or entered upon administration of the estate, neither did any other of the executors, in consequence of which the District Court thereafter committed administration *testameto annexo* to Mr. Mack.

Plainly, the plaintiff through the administrator has title in him, and defendant claiming under the sale in execution of the judgment against Susey Fernando has none. If Susey Fernando had clothed himself with office

as executor, he could have dealt with the estate, and his office would have related back to the testator's death. He never actually did accept office, and the judgment against him conferred on the judgment creditor no right whatever to touch the testator's assets. Further than this, even if Susey, when that judgment went against him, had actually taken office as executor, I do not see what right the judgment holder would have to sell assets of the estate himself. If the defendant executor did not satisfy the judgment, the judgment creditor might institute a creditor's suit to administer the estate. What he did was to purport to sell the interest of Susey in this property, which was nothing.

Therefore, it appears that plaintiff is entitled to a declaration of title to one-half of the house in question, the half belonging to Pasqual Fernando's estate. The widow's half he does not touch.

In my opinion the judgment appealed from must be set aside and in lieu thereof it must be decreed that plaintiff is entitled to half of the house in question and placed in possession thereof, and that defendant do pay plaintiff's costs in both courts.

Dias, J.— nthony Pulle and his wife Ana made their joint will and appointed seven persons as executors. The husband died in 1882, and one of the seven executors, Susey Fernando Bastian Pulle, proved the will, but did not take out probate. None of the other executors interfered in the matter, and they don't appear to have renounced their trust. The wife, who is still alive, repudiated the will and fell back upon her common law rights, and the result was that the will only took effect as to the deceased husband's half of the common estate. In 1883 a creditor sued the executor, who proved the will on a promissory note granted by the testator, obtained judgment against the executor, issued writ, and through the Fiscal seized and sold the premises in dispute, when Santa Croos Fernando became the purchaser, and in 1886 mortgaged the property to the New Oriental Bank Corporation. The Bank put the bond in suit and obtained a writ of execution, and at the Fiscal's sale which followed the defendant purchased the property. In the meantime, the executor who proved the will having failed to take out probate, the Secretary of the District Court, Mr. Mack, was appointed administrator with will annexed. Mr. Mack, with leave of Court, sold the property by public auction, when plaintiff became the purchaser.

Mr. Mack's appointment appears to me to have been quite irregular. It was made on his own application. There were seven persons named in the will as executors, one of whom brought the will into Court and proved it, thereby accepting the trust. He does not appear to have been called upon to take out probate and administer the estate, or renounce his trust. Nobody knows what became of the other executors.

In this state of things Mr. Mack's appointment seems to me to be bad from the beginning. He sold the property in 1889, *i.e*, six years after the Fiscal's sale, at which the defendant's predecessor in title became the purchaser. When Mr. Mack sold the land the defendant was in actual occupation, and probably opposed the sale.

The question for decision is, whether the judgment against Susey Fernando Bastian Pulle, the executor who proved the will, is binding on the estate. If this is answered in the affirmative, the plaintiff's case fails; if in the negative, the plaintiff succeeds and this judgment should be reversed.

The case against Susey Fernando Bastian Pulle (D. C. Colombo, 89,143) was instituted in 1883. The libel sets out the last will of the testator and the appointment of Susey Fernando Bastian Pulle as executor and alleges the proof of the will by the executor; and the libel concludes with a prayer for judgment against the defendant as executor. The defendant did not appear, and a rule for judgment was issued, and on the returnable day the plaintiff's proctor moved that the rule might be made absolute and judgment entered against the defendant in terms of the libel, and the following decree was recorded: "that the plaintiff do recover from the defendant Rs. 500". I take it that this is a decree against the defendant as executor and not in his personal capacity, and the next question is, was the defendant clothed with sufficient authority to bind the estate of his testator? His own act of proving the will shews that he accepted the trust in doing an unmistakable act by proving the will. In *Douglas* v. *Forrest* (1 Moore and Payne 663) it was held that any executor who has done some act to constitute himself executor might be sued for debts of the testator before the will is proved. The reason of this qualification of the executor's liability to be sued is given by Best, C. J., who delivered judgment in these terms:—"It would be injustice to allow actions to be brought against an appointed executor who never meant to act as such before he had an opportunity of renouncing." The case now before us is much stronger than the case above referred to. Here the executor had no idea of renouncing his trust; on the contrary he elected to accept the trust and proved the will, though, for some reason not explained, he did not go any further (See further *Doyle* v. *Blake*, 2 Schoales and Lefroy p. 245, and *Rogers* v. *Frank*, 2 Young and Jervis, 414, 415).

In my opinion the learned District Judge took a correct view of the law, and his judgment should be affirmed.

Present:—Burnside, C. J., and Clarence and Dias, JJ.

(*September* 8 *and October* 2, 1891.)

D. C. Colombo, No. 98,398. } Mendis v. Peiris.

Partnership—action for account—parole evidence—Ordinance No. 7 *of* 1840, *section* 21, *sub-section* 4.

In an action for partnership account by one partner against the other, in which the partnership is denied—

Held that, notwithstanding the provisions of the Ordinance No. 7 of 1840, parole evidence is admissible to establish the partnership, if it has already been dissolved, although the capital of the partnership exceeded Rs. 1,000.

D. C. Kandy 52,568, Vand. Rep. 195, followed.

The plaint averred that the plaintiff and the defendant had entered upon a common undertaking for the purpose of common profit, namely, the construction of a building which the defendant had contracted with the Government to build; that the work was completed on a certain day and the remaining material and stock, valued at Rs. 1,428, were taken possession of by the defendant; that the profits of the concern amounted to Rs. 4,812; and that defendant had failed to render an account to the plaintiff or pay to plaintiff his share of the profits and assets. And the plaintiff prayed (1) that the partnership be declared to have been dissolved, (2) for sale of the stock, and (3) for an account.

The defendant demurred to the plaint, and also denied the alleged partnership.

At the trial the defendant objected to the admission of parole evidence which the plaintiff sought to give in proof of the partnership, but the objection was overruled and evidence heard. On the evidence the District Judge held that the alleged partnership existed and that the work of building was undertaken and completed by both parties together, and he proceeded to decree that the partnership be declared dissolved as from the date of the decree and that an account be taken of the partnership as prayed for. From this judgment the defendant appealed.

Browne (*Dornhorst* with him) for defendant appellant. Parole evidence was not admissible in this case. Judgment of Burnside, C. J., in *D. C. Ratnapura* No. 22,47½, 6 S. C. C. 119. Further, on the footing of plaintiff's own case the alleged partnership still exists, for the suit is not one for recovery of a balance due on accounts already taken, as in case reported Vand. 195, but is one for accounting, and the District Judge in fact declared the partnership dissolved as from the date of the decree. So this case is distinguishable from that in Vand, for there nothing remained but to pay over amount already ascertained, which amounts to an action on account stated. The opinions expressed by the judges in D. C. Galle 55,354, 1 C. L. R. 53, were not necessary for the decision of that case, and so it is contended that parole evidence was not admissible to establish the alleged partnership.

Withers for plaintiff respondent. The partnership in this case was for a single transaction, viz., the construction of certain buildings. With the completion of the buildings the partnership terminated. The declaration in the decree, it is submitted, is only the formal record of the fact. So the case in Vand. 195 applies. Further, it is not shown that the capital of the partnership exceeded Rs. 1,000. What is relied on is the value of the assets and the profits made during the partnership. But it is submitted these do not constitute capital. Capital is what is contributed by the partners at starting. Lindley on Partnership (5th ed.) p. 320. So parole evidence was admissible even under the Ordinance No. 7 of 1840.

Dornhorst in reply.

Cur. adv. vult.

On October 2, 1891, the following judgments were delivered:—

Burnside, C. J.—I cannot consent to affirm this judgment without doing violence to my own opinion as well as to the judgment cited from Vanderstraaten, by which I must be bound. I have already stated my own opinion as to the construction to be put on section 21 of the Ordinance No. 7 of 1840. The case in Vanderstraaten decides that parole evidence cannot be admitted so long as the partnership is in existence.

The District Judge has found as a fact that the partnership was an existing partnership up to the time of hearing, because he decrees that the partnership be dissolved from the date of the decree. It could only be dissolved if it existed; and if it existed, no parole evidence of its existence should have been admitted, if the decision in Vanderstraaten is to be recognized.

The conclusion seems to me to be irresistible and conclusive. Otherwise, as the case in Vanderstraaten rules that the Ordinance does not apply when the partnership has been dissolved, and parole evidence has been admitted in this case before it has been dissolved, the joint judgments of this court would repeal the Ordinance altogether and let in parole evidence always.

The defendant should have judgment.

Clarence, J.—Plaintiff sues defendant for an account of a partnership which the plaint suggests to have existed between them. The plaint is somewhat guarded and timid in its averments, but its

substance appears to be that plaintiff and defendant shared as partners the work of erecting some buildings at the Colombo Lunatic Asylum, the contract for which defendant had obtained from the Government. The plaint avers that no agreement was made as to the amounts which the partners should contribute to the work or as to the proportion in which they should share the profit or loss. It avers that the work has been concluded and that defendant has the books of account, and prays for an account. The defendant by a traverse puts plaintiff to proof of the partnership.

The question has been argued before us—whether parole evidence was admissible to prove this partnership. I think the evidence was admissible. The decision, reported Vanderstraaten 195, is binding upon us, and the case falls within the scope of that decision, because upon the case as put forward by plaintiff the partnership, if one there was, has come to an end with the undertaking which was its object, and nothing remains to be done but to take the accounts and adjust the balance between the partners.

This suit was instituted as far back as 1887, and the hearing appears to have been from time to time postponed mainly on account of the absence of a witness whom plaintiff had subpœned and against whom the court found it necessary to issue in an attachment. This was one Arnolis, a nephew of the defendant. In the meantime the plaintiff died, and the action is continued by his executrix.

The learned District Judge has found upon the evidence that there was a partnership, and upon a perusal of the evidence I think that we ought not to interfere with that finding. The defendant's assertion is, that he engaged the plaintiff as his superintendent of works, promising him Rs. 20 a month and one-third of the profits. Under the Ordinance No. 21 of 1866, which repeats the provisions of Sir W. Bovil's Act (1865), an agreement for the remuneration of an employe by a share of profits does not of itsef make the employe a partner, but the evidence generally supports the inference that the late plaintiff was admitted by the defendant as a partner in the business of the contract which defendant had obtained from the Government. The evidence of Mr. Taffs and of Mr. A. Fernando indicates that the plaintiff was a partner, and that of Arnolis, whom the District Judge characterizes as an unwilling witness for plaintiff, points in the same direction.

I would therefore affirm the order appealed from in so far as it recognises a partnership between the defendant and the late plaintiff, and declares that partnership to be dissolved, and decrees an accounting, but I do not see my way to affirm the learned District Judge's direction that after such accounting the net profits shall be divided in equal shares. I think that that question should come up again for further consideration after the taking of the account as directed by the District Judge.

With this modification I would affirm the order. Defendant must pay plaintiff's costs of suits to this date, and must also bear the costs of this appeal.

Dias, J.—It appears that plaintiff and defendant were engaged as partners in some building work. The partnership was confined to this work. I presume that the partnership would terminate with the work. There was not a written deed of partnership. The plaintiff is dead, and he is now represented by his executor. The defendant denies the partnership, and on the evidence I am satisfied that a partnership did exist between the parties. The libel prays for declaration that the partnership had been dissolved, meaning that it had already been dissolved, and for an account. The defendant denied the partnership and put the plaintiff to the proof, and the defendant adduced parole evidence, which, though objected to, was received by the District Judge; and the principal question which we are called upon to decide is, whether, under the circumstances, a partnership can be proved by parole. Under Ordinance No. 7 of 1840 an existing partnership cannot be proved except by a written instrument; but when the partnership came to a termination either by some act *inter partes* or the natural termination of the partnership, as in this case, by the accomplishment of the object for which the partnership was entered into, parole evidence is admisible (Vand. Rep. p. 195). I agree with the District Judge that the late plaintiff and defendant were partners and the partnership terminated before the institution of this case. I would affirm the judgment with the modification suggested by my brother Clarence. Defendant must pay the plaintiff's costs.

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Present:—Burnside, C. J., and Dias, J.
(*October* 27, 1891.)

D. C. Colombo, Testamentary No. 63.

In the matter of the goods and chattels of Meera Lebbe Udoma Lebbe, deceased.

William Joseph Gorman, Secretary of the Ceylon Savings Bank, Petitioner.

Samse Lebbe Ismail Lebbe Marioar and others, Respondents.

Administration—creditor's application—Secretary of the Ceylon Savings Bank—verification of debt—affidavit to lead citation—procedure—Civil Procedure Code, sections 523, 530, *and* 544.

The Secretary of the Ceylon Savings Bank applied for and obtained letters of administration to the

estate of a person who died in 1877, averring in his petition that the deceased was indebted to the Bank in a certain sum of money on bonds dated 1853, 1859, and 1872. But the affidavit to lead citation neither verified the debt nor stated circumstances showing that the debt was not barred by prescription.

Held that the grant of letters of administration was irregular.—

By BURNSIDE, C. J., on the ground that the testamentary procedure under the Code did not apply to the estates of persons who died previous to its coming into operation.

By CLARENCE, J., on the grounds (1) that the creditor being the Bank and not the Secretary of the Bank, the provisions respecting a creditor's applications for letters did not warrant their issue to the Secretary, and (2) that in the absence of statements in the affidavit to lead citation setting forth the particulars of the debt and the circumstances showing it not to be statute barred, the Court had not before it the facts which would justify the claim for administration.

In this matter the Secretary of the Ceylon Savings Bank by petition dated April 22, 1891, applied for letters of administration to the estate of a person who died so far back as 1877. Four persons were named as respondents to the petition, of whom the last three, the widow and two daughters, were stated in the petition to be heirs of the deceased. The petition further stated that the deceased at the date of his death was "indebted to the trustees of the Bank in the principal sum of Rs. 750 on three mortgage bonds dated respectively 21st March, 1853, 7th April, 1850, and 28th September, 1872", and that the petitioner had been requested by the trustees to apply for and obtain letters of administration to the estate of the deceased. But the affidavit accompanying the petition made no allusion whatever either to the heirs or to the alleged debt.

The Court upon this application allowed an order *nisi*, and the first respondent appeared and opposed the application on the grounds that no debt was due by the deceased, and that, if there was one, it was barred by prescription, no interest having been paid within the prescriptive period.

At the hearing of the matter evidence was adduced on behalf of the petitioner with the view of proving the debt and of payment of interest till within a recent period by a person named Pitche Tamby Samsie Lebbe. The District Judge found for the petitioner on the facts and ordered that the second respondent, the widow of the deceased, should take out letters of administration to her husband's estate within one month of the date of the order and that in her default letters should be granted to the petitioner, the Secretary of the Savings Bank. From this order the first respondent appealed.

Dornhorst (*Morgan* with him) for appellant.

J. Grenier for respondent.

Cur. adv. vult.

On October 27, 1891, the following judgments were delivered:—

BURNSIDE, C. J.—This appeal must be governed by the decision of the Court, that the Code gives no power to proceed under its provisions in respect of testamentary rights which accrued before the passing of the Code. Such proceedings should be, as the Code points out, by "the procedure and practice hitherto in force". The proceedings are set aside with costs.

CLARENCE, J.—This is an appeal from an order of the District Court made in the matter of the intestacy of one Meera Lebbe Udoma Lebbe said to have died intestate in 1877. The Secretary of the Ceylon Savings Bank applies for a grant of administration to himself as representing the Bank, said to be a creditor of the estate. The District Court has made an order that in failure of the intestate's widow taking out letters of administration within one month, administration be committed to the applicant, and against this order one Samsie Lebbe Ismail Lebbe Marcar, who is named as first respondent in applicant's petition, appeals. I am of opinion that the order cannot be supported.

This is a creditor's application for administration. By section 29 of the Savings Bank Ordinance 1859 all effects of the Bank and all rights and claims of the Bank are vested in the trustees. *Prima facie*, therefore, it is the trustees who are the creditors It is sought to warrant this application for a grant to the Secretary by a reference to section 470 of the Civil Procedure Code, but that section does not touch the matter. It enacts that in actions by or against any public body the name and style of the body or of the officer (if any) in whose name the body is authorised to sue and be sued may be inserted as the name of the plaintiff or defendant, and the plaint subscribed on behalf of the body by any member, secretary or principal officer who can depose to the facts. This certainly does not authorize a grant of letters of administration to the secretary of a public body. By section 25 of the Ordinance the trustees may sue and be sued as "the Trustees of the Ceylon Savings Bank". It is not necessary for us to discuss the question, whether, upon a properly constituted application by the trustees as creditors, the District Court would be justified on their express application in granting administration to their Secretary. It is sufficient to say that no warrant is found for the present application made by the Secretary himself as petitioner.

On the above grounds alone, we ought to set aside this order, but we may further point out that, apart from the above, the application does not comply with the essentials of a creditor's application. Section 530 of

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the Code requires the material allegations in the petition to be supported by *prima facie* proof by affidavit or oral testimony. Now, the petitioner's affidavit to lead citation contains no reference whatever to the intestate's heirs or to the debt on which the application is based. In the absence of a proper affidavit to lead citation, no citation ought to have issued. The petition contains an allegation, supported by no affidavit, that to the best of petitioner's knowledge the intestate's heirs are his widow and two daughters. A fourth person, however, the present appellant, is made a respondent to the application. Why appellant should have been made a party, we are not informed. Since, however, he has been made a party, we accept him as a party entitled to appeal.

The affidavit to lead citation, further, as I have already noticed, contains no reference whatever to the debt on which the application purports to be based. Where the application for letters of administration is made by a party claiming to be a creditor of the deceased, the affidavit is always required to state the particulars of the debt and of the time when it became due, in order that it may be seen that the debt is not statute barred. This is matter of common practice, and our Code is careful to point out that the petition, supported by evidence of its material allegations, should "show the facts which justify the claim." At the time when the District Court was asked to make, and in fact did make, an order *nisi* in appellant's favour, there was no evidence whatever before the Court in support of petitioner's claim that the Saving's Bank is a creditor of this estate, entitled to sue for its debt. From the proceedings at the discussion of the order *nisi* it appears that the claim of the Bank is upon three obligations purporting to have been granted in 1853, 1859 and 1872. Therefore, the affidavit to lead citation should have deposed to facts taking the claim out of the operation of the Prescription Ordinance.

At the discussion of the order *nisi*, evidence was adduced going to show that interest on these obligations had been paid to the Bank, since the death of the intestate, by a person named Pitche Tamby Samsie Lebbe. It would, however, be necessary to show further, that the person by whom those payments were made was a party whose position in relation to those concerned was such that his payment would operate as against those concerned, in preventing the statutory bar from coming into effect.

We need not, however, discuss this matter, since the petitioner's application clearly fails upon the grounds firstly indicated. The Bank or their Secretary appear to have been injudiciously advised in the matter of this application. The order must be set aside and the applicant must pay the respondent's costs in both Courts.

Present:—CLARENCE and DIAS, J. J.

(*May* 12 *and* 22, 1891.)

D. C. Kandy, No. 3833. { MUTU MENIKA v. ANDERSON. JAMES S. SINCLAIR, Executor of the last Will and Testament of John Forbes McLeod, Added Party.

Executor—devisee of immoveable property—title of executor—right to possession—assent—devisee in possession—right to rents and profits.

In Ceylon land passes to the executor as personal property passes to the executor in England and the assent to a devise of land corresponds to the assent to a bequest of personal property in England.

The title of the devisee of land is subject to the executor's power of assent or otherwise, and until that assent has been given, the executor has a right to the possession of the property, subject to his having to account to the devisee for mesne profits in the event of the devise taking effect.

But where the devisee has been allowed to take and remain in possession and has disposed of the produce of the land on contract to a third party, pending the administration of the estate by the executor,

Held, that the devisee is entitled to claim the price from the purchaser as against the executor, subject to the executor's power, in the event of resort to the property being necessary for the payment of debts, to call upon the devisee to account for the mesne profits since the testator's death.

The facts of the case appear in the judgment of the Supreme Court.

The executor, added party, appealed from a judgment of the District Court in plaintiff's favour.

Browne for appellant.

Dornhorst for respondent.

Cur. adv. vult.

On May 22, 1891, the following judgment was delivered:—

CLARENCE, J.—Mr. John Forbes McLeod, having children by the plaintiff, a Kandyan woman, made provision for her and the children by placing them on a small estate of about 50 acres at Pasbage, where they lived until his death which occurred not very long ago. By a codicil to his will, of which the appellant, Mr. Sinclair, is executor, Mr. McLeod in effect devised the property to the plaintiff for her life, with remainder to the children. The estate, it would appear, is now in tea and the plaintiff in May to July 1890 sold leaf to the defendant. The executor having taken the step of warning the defendant to pay for the leaf to him and not to the plaintiff, the defendant thought it best to withhold payment pending some order of Court. The plaintiff then sued the defendant in this action for the price of the leaf. The executor has been made an added party, and a sum of Rs. 196·59, brought into

Court by the defendant, is the matter of contest between the plaintiff and the executor.

The position taken up by the executor is this :—he informs the Court that he has not as yet assented to the gift to plaintiff and the children, that he has not yet been able to ascertain the full extent of the testator's indebtedness in Scotland, and is as yet unable to say, whether or no it may be necessary to resort to this property for the payment of debts. He gives the Court to understand that he made a proposal to take possession of this property, which was resisted by the plaintiff, who under the testator's arrangements had been living on the property for something like 16 years.

There is very material difference between the laws affecting the devolution of land in this Island and in England, and we cannot apply to land in this Island the English law governing those cases in which it is sought to resort for payment of a testator's debts to lands specially devised. I adhere to the ruling of my brother Dias and myself in the case reported 8 S. C. R. 192, that in Ceylon land passes to the executor as personal property passes to the executor in England, and that the assent to a devise of land corresponds to the assent to a bequest of personal property in England. I think it clear that in Ceylon the title of the devisee of land is subject to the executor's power of assent or otherwise' and that until that assent has been given the executor has a right to the possession of the property. This Court so held in the case cited. We do not know when Mr. McLeod died. If this leaf was sold before Mr. McLeod's death, the executor is out of Court at once, but I will assume for the purposes of this appeal, that the money now in question is the price of leaf sold after the testator's death.

This property which the testator has devised to the plaintiff and his children by her may be resorted to hereafter, if needful for payment of his debts. It is not necessary now to consider whether any and what rules of marshalling may be applied under such circumstances in favour of a devisee. It is enough for the present to say, that the land passed in the first instance to the executor, the devise notwithstanding. Probably the executor would have been within his rights, had he insisted on taking possession immediately on obtaining probate. He seems to have made some motion towards obtaining possession but did not press the matter. It would no doubt have been a hard measure to remove this woman and her children from the house and land which the testator had for so many years allowed to them for their livelihood during his life and which he devised to them for the time to come. Moreover, had the executor taken the step of assuming possession, he would have been accountable to plaintiff for profits in the event, which, to say the least, is not improbable, of the devise hereafter taking effect. But since the executor has not ventured to assume the possession of the property, in consequence of which the plaintiff has since the testator's death been living on the property and selling leaf to the defendant's factory, I do not think that he can now step in, as he wishes to do, and claim the price of the plaintiff's leaf sale. As at present advised, I am of opinion that the executor might, on obtaining probate, have insisted on taking possession. Whether he would have been wise to do so, is another question. But I think that the learned District Judge is right in holding, in the course which has been taken, that the executor cannot now insist on having paid to him the price of the leaf which is the result of the plaintiff's contract with the defendant' It may be that hereafter it may be found necessary to resort to this property in order to pay the testator's debts, and it may be necessary in such a proceeding to call upon the plaintiff to account for mesne profits since the testator's death, in which case plaintiff may have to account for what she is now receiving. The order now made by the District Judge is in my opinion right, and this appeal should be dismissed with costs.

Dias, J. concurred.

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Present:—Burnside C. J. and Dias J.

(*August* 11 *and* 18, 1891.)

D. C. Chilaw, No. 77. } Paulickpulle v. Casie Chetty.

Jurisdiction—breach of promise of marriage—action on marriage agreement cause of action—pleading.

By a written agreement executed by the plaintiffs, father and daughter, at Chilaw and by the defendant at Colombo, it was agreed, among other things, that the defendant should marry the second plaintiff at Chilaw within a certain time.

In an action brought in the District Court of Chilaw, it was alleged as a breach that within the time specified the defendant was married to a third person at Colombo.

Held that the District Court of Chilaw had no jurisdiction, but that, the cause of action being alleged to be the marriage of the defendant to a third person at Colombo, the action should have been brought in the District Court of Colombo.

The defendant appealed from an order of the District Court overruling his plea to the jurisdiction and from a decree in favour of the plaintiffs.

The facts of the case sufficiently appear in the judgment of Burnside, C. J.

Dornhorst for defendant appellant.

Browne for plaintiffs respondent.

Cur. adv. vult.

On August 18, 1891, the following judgment was delivered :—

Burnside, C. J.—The second plaintiff and the defendant had agreed to marry one another and by deed purporting to be executed by the first plaintiff, the second plaintiff's father, of the one part and the second plaintiff of the second part at Chilaw on the 6th September, and by the defendant of the third part on 10th September at Colombo, the parties covenanted *inter alia* :—

1. The defendant, that he, the defendant, would within three months from the date of the deed marry the second plaintiff at Chilaw.

2. The first plaintiff, that his daughter, second plaintiff, would marry the defendant within three months at Chilaw.

3. In consideration of the marriage, the first plaintiff further agreed that "on the execution of these presents" he would pay defendant Rs. 500, and within a reasonable time after three months from the marriage grant and bestow (upon whom is not provided) landed property worth Rs. 1,500. It was then provided that if the defendant "fail refuse or in any manner object to marry the second plaintiff within the three months," he shall pay to the first plaintiff for the use and benefit of the second plaintiff Rs. 1,000 as damages agreed between them, and if second plaintiff did fail refuse or in any manner object to marry the defendant, that first plaintiff should pay to the defendant a like sum of Rs. 1,000.

Such were the terms of the marriage contract between the first and second plaintiffs and the defendant, based on the agreement which had already existed between second plaintiff and defendant.

Before the three months had expired, the defendant married some one else at Colombo, and this action was brought after the expiration of the three months.

The action was brought in the Chilaw Court and is a joint action of the father and daughter. Why the daughter was joined, is not very apparent, but no objection was taken on the ground of misjoinder. The plaintiffs in their libel prayed judgment for Rs. 1000 to be paid to the first plaintiff for the use and benefit of the second plaintiff, for Rs. 100 to be paid to the first plaintiff for his own use, for the return of an engagement ring to the first plaintiff which he had given the defendant, or payment of its value, and for costs.

I have recited the prayer of the libel in full because a prayer that the Court would order damages to be paid by one person to another for the use of a third is, I think, unique.

The defendant *inter alia* put in a plea to the jurisdiction, with which under the circumstances of the case we can have but little sympathy, and if we uphold it, it is only because we are bound to do so. His main defence, that he discovered after the agreement that the second plaintiff was by reason of disease unfit for the marriage, was not pressed at the trial.

I think we may take it as proved, that the first plaintiff did not pay the defendant the sum of Rs. 500 as he had agreed to do, but paid him only Rs. 100 and that in this respect the first plaintiff had committed a breach of his covenant.

I have gone into some of the particulars of the case, because it appears to me that, had we held that the plaintiffs were entitled to succeed on the plea to the jurisdiction, yet they could not in their form of action have benefited materially by it. The District Judge has given judgment for the plaintiffs for Rs. 1100 and for the ring with costs. The defendant appeals. Now the judgment is contrary to the prayer. What was prayed for was that Rs. 1000 be paid to the first plaintiff for the use of the second plaintiff. The defendant had covenanted to pay Rs 1000 to the first plaintiff for the second plaintiff, but I fail to see how the first plaintiff had any right of action except for nominal damages on the agreement. The first plaintiff was not prejudiced by reason of the money not being paid. It was the second plaintiff who would sustain damage, and the action for damages should have been in her name only. Nor could the first plaintiff recover the money he had paid on account of the Rs. 500 which he had covenanted to pay. There was no agreement on the part of the defendant to repay the first plaintiff if he, the defendant, did not marry, and the consideration for the plaintiff paying the Rs. 500 or any part of it, was that the defendant had promissed to marry; so that in this action it appears that the plaintiff, if entitled to recover anything, could only recover nominal damages.

Under these circumstances, we must have less reluctance in upholding the plea to the jurisdiction.

The defendant committed the breach, when he married some one else in Colombo. True, the contract contemplated the marriage being celebrated in Chilaw, but the libel itself alleges the breach at Colombo by the defendant marrying there, and so putting it out of his power to perform his agreement to marry at Chilaw. The breach of this covenant constitutes the cause of action, and under the Code the action must be brought in the Court in which the cause of action arose. Hence the action should have been brought in Colombo and not in Chilaw, and the plea to the jurisdiction must prevail, and the plaintiff's action be dismissed with costs in both Courts.

Dias, J. concurred.

END OF FIRST VOLUME.

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